Form No. 7 B & P CO

San Francisco
Law Library

No.....

Presented by

.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1873

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the Estate of FRED DORR, a Bankrupt.

CARROLL ALLEN,

Petitioner,

vs.

JOHN J. FORBIS, Claimant,

Respondent.

TRANSCRIPT OF RECORD.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of a Certain Order of the United States District Court for the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1873

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the Estate of FRED DORR, a Bankrupt.

Records of U. S. Circuit Court of Appeals

620

TRANSCRIPT OF RECORD.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of a Certain Order of the United States District Court for the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1873

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the Estate of FRED DORR, a Bankrupt.

CARROLL ALLEN,

Petitioner,

vs.

JOHN J. FORBIS, Claimant,

Respondent.

TRANSCRIPT OF RECORD.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of a Certain Order of the United States District Court for the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

IN BANKRUPTCY.

In the Matter of the Estate of FRED DORR,
a Bankrupt.

Notice of Filing Petition for Review.

To W. T. Craig, Attorney for John J. Forbis, a Claimant Against said Bankrupt's Estate:

You are hereby notified that on the 29th day of June, 1910, we will file in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, California, a petition for review of the order of the United States District Court, Southern District of California, Southern Division, made and entered on the 20th day of June, 1910, affirming the order of the Referee in re the claim of John J. Forbis, a copy of which said petition for review is served herewith. We will then ask to have said case docketed and the necessary order made thereon to have such cause set down for hearing.

HICKCOX & CRENSHAW,
Attorneys for Carroll Allen, Trustee of the Estate of Fred Dorr, a Bankrupt.

I hereby accept service of the above notice this 27th day of June, 1910.

W. T. CRAIG,
Attorney for Claimant, John J. Forbis.

[Endorsed]: Original. In the United States Circuit Court of Appeals in and for the Ninth Circuit.

In Bankruptcy. In the Matter of the Estate of Fred Dorr, a Bankrupt. Notice of Filing Petition for Review.

[Petition for Revision.]

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

IN BANKRUPTCY.

In the Matter of the Estate of FRED DORR,
a Bankrupt.

PETITION OF TRUSTEE FOR REVIEW OF ORDER AFFIRMING DECISION OF REFEREE REJECTING TRUSTEE'S PETITION TO RECONSIDER AND REJECT CLAIM OF JOHN J. FORBIS.

To the Honorable Judges of the United States Circuit Court of Appeals in and for the Ninth Circuit:

Your petitioner, Carroll Allen, respectfully represents that he is now and at all the times herein mentioned has been, the duly appointed, qualified and acting Trustee of the Estate of Fred Dorr, a bankrupt.

That one John J. Forbis, having filed a claim in the above-entitled matter against the estate of said Fred Dorr, a bankrupt, with the Hon. Lynn Helm, one of the Referees in Bankruptcy in and for the United States District Court, Southern District of California, Southern Division, a certified copy of the said claim is filed as a part hereof and marked

"Exhibit No. 1," and the said claim was, on the 11th day of December, 1908, allowed by the said Hon. Lynn Helm, Referee as aforesaid, for the sum of Seven Thousand Three Hundred Twelve and 89/100 Dollars ($7,312.89).

That thereafter, to wit, on the 11th day of May, 1909, your petitioner filed with said Referee, a petition for the reconsideration and rejection of the said claim of the said John J. Forbis, a certified copy of which said petition for reconsideration and rejection is filed as a part hereof, marked "Exhibit No. 2."

That thereafter, your petitioner and said claimant stipulated, in writing, the facts upon which said petition for rejection and reconsideration of said claim was to be heard, to wit, on the 11th day of May, 1909, a certified copy of which stipulated facts is filed as part hereof, marked "Exhibit No. 3," and thereafter, said petition for rejection and reconsideration of said claim was argued and fully submitted.

That on the 13th day of December, 1909, the said Honorable Lynn Helm, as Referee, denied the petition to reconsider and reject said claim of John J. Forbis, and on the 28th day of December, 1909, filed his order and decree on the said claim of said Forbis, a certified copy of which said order and decree is filed as a part hereof, marked "Exhibit No. 4."

That thereafter, to wit, on the 14th day of February, 1910, your petitioner filed his petition in the said District Court for a review of the said order and decree of said Referee denying said Trustee's petition for the rejection and reconsideration of the said claim of said Forbis, a certified copy of which

said petition for review of said order of said Referee is filed as a part hereof, marked "Exhibit No. 5."

That thereafter, said matter was duly and regularly set down for hearing before the said District Court on the 20th day of June, 1910, and on the said 20th day of June, 1910, an additional stipulation in writing, as to the facts in said case, was filed in said District Court, a certified copy of which said additional stipulation of facts is filed as a part hereof, marked "Exhibit No. 6."

That thereafter, on said 20th day of June, 1910, the matter having been argued and duly submitted to the Honorable Olin Wellborn, Judge of said District Court, said Court entered an order affirming the decree of the said Referee, to which said order your petitioner duly excepted, a certified copy of which said order affirming said order and decree of said Referee, is filed as a part hereof, marked "Exhibit No. 7."

Your petitioner further says that he is aggrieved by the order of said District Court and injured thereby, and that the errors complained of consist:

First: In holding that said claim of John J. Forbis was not based upon the contract for the purchase of stock on a margin.

Second: In holding said claim was not founded upon a marginal gambling transaction in stock.

Third: In holding that the contract of purchase upon which said claim is based is not in conflict with the provisions of section 8416 of the Revised Codes of the State of Montana.

Fourth: In holding that the contract upon which said claim is based was not illegal.

Fifth: In holding that said claim was not barred by section 8416 of the Revised Statutes of the State of Montana.

Sixth: In holding that the contract upon which said claim is based was not void.

Seventh: In holding that the contract upon which said claim was founded was not prohibited by the public policy of the State of Montana.

Eighth: In holding that said Forbis was entitled to have said claim allowed notwithstanding the provisions of said section 8416 of the Revised Codes of the State of Montana.

Wherefore, your petitioner prays that said order of said District Court be reviewed and revised in matters of law, and that said order be reversed; and for all proper relief herein.

HICKCOX & CRENSHAW,

Attorneys for Carroll Allen, Trustee of the Estate of Fred Dorr, a Bankrupt, Petitioner.

Exhibit No. 1.

CERTIFIED COPY.

Stock Account.

John J. Forbis,
Hennessy Bldg.,
Butte, Montana.

	Dr.	Cr.
1908 Debit Balance	$11,298.15	
Long 400 Steel Com.		
Aug. 12 Sold 400 Steel Com.		
46 7/8		$18,750.00
Commission	50.00	
Tax	8.00	
Interest	80.96	
	$11,437.11	$18,750.00
		$ 7,312.89

In the District Court of the United States, Southern District of California, Southern Division.

IN BANKRUPTCY.

In the Matter of FRED DORR,

Bankrupt.

Proof of Unsecured Debt.

At Butte, in the Federal District of Montana, on the 28th day of October, A. D. 1908, came John J. Forbis, of Butte in the County of Silver Bow, in said Federal District of Montana, and made oath, and says that Fred Dorr the person against whom a petition for adjudication of bankruptcy has been filed,

was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Seven Thousand Three Hundred Twelve and 89/100 Dollars; that the consideration of said debt is as follows: Balance due claimant on an open brokerage account between said bankrupt and claimant, a statement of which is hereto annexed and hereby referred to as a part hereof. That no part of said debt has been paid; — no note has been received for said indebtedness, nor for any part thereof, nor has any judgment been rendered thereon, except as hereinabove stated; that there are no setoffs or counterclaims to the same and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

JOHN *F.* FORBIS,
Creditor.

Subscribed and sworn to before me, this 28th day of October, 1908.

[Notarial] JOHN E. CORETTE,
Notary Public in and for the County of Silver Bow, State of Montana.

My commission expires June 19th, 1910.

All notices to be given the said claimant shall be addressed to W. T. Craig, Los Angeles, California, who *are* authorized to waive notices in said matter, and to receipt for and collect all dividends.

JOHN *F.* FORBIS,
Claimant.

[Endorsed]: No. 173. United States District Court, Southern District of California, Southern Division. In the Matter of Fred Dorr, Bankrupt. Proof of Unsecured Debt of John J. Forbis, for $7,312.89. Filed Nov. 9, 1908 at 3 o'clock P. M. Lynn Helm, Referee in Bankruptcy. Allowed Dec. 11th, 1908. For $7,312.89. Helm, Referee in Bankruptcy. Forward all notices and dividends to W. T. Craig, Attorneys for Board of Trade Equitable Savings Bank Building, Los Angeles, Cal.

Exhibit No. 2.

In the District Court of the United States in and for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 173.

In the Matter of the Estate of FRED DORR,
Bankrupt.

Petition for Reconsideration and Rejection of the Claim of John J. Forbis.

Honorable LYNN HELM, Referee.

Comes now Carroll Allen, the duly elected, qualified and acting trustee of the estate of Fred Dorr, a bankrupt, and alleges as follows, to wit:

I.

That heretofore, to wit, on the 11th day of December, 1908, the claim of John J. Forbis was allowed herein for the sum of $7,312.89.

II.

That said claim should be reconsidered and rejected on account of the following facts, to wit:

First—That said bankrupt, Fred Dorr, during the months of January to July, both inclusive, 1908, was conducting a brokerage business in an office in the city of Butte, State of Montana, where grain stocks and securities were sold on margin.

Second—That in the city of Butte, State of Montana, on the 30th day of June, 1908, said claimant, John J. Forbis, purchased on margin, of said Dorr, 300 shares of the common stock of the United Steel Corporation at 37 3/4, and 100 shares of said stock at 37 7/8, the total purchase price amounting, with commission, to the sum of $15,162.50; that the only sum paid on account of said purchase was the sum of $3,864.35, which sum was deposited with said Dorr as a margin, on said purchase, and left a balance due, on account of said purchase, to said Dorr of the sum of $11,258.15, for which amount said Dorr held the stock so purchased on margin, as security.

Third—That said stock was never delivered by said Dorr to said Forbis.

Fourth—That said claim of said Forbis is based upon the foregoing transaction for the sale of stock on margin.

Fifth—That said claim is barred by the provisions of section 8416 of the Revised Codes of Montana.

Sixth—That said claim is based upon a sale of stock on margin; that the contract for the purchase of said stock was and is, illegal and void, being prohibited by public policy of the State of Montana,

the State in which said transaction was had upon which said claim is based.

Wherefore, said trustee prays that a day may be set for the reconsideration of such claim and after due notice thereof a hearing may be had, and that upon such hearing said claim may be expunged.

CARROLL ALLEN,
Trustee.

HICKCOX & CRENSHAW,
Attorneys for Trustee.

United States of America,
State of California,
County of Los Angeles,—ss.

Carroll Allen, being duly sworn says: That he is the duly elected, qualified and acting trustee of the estate of Fred Dorr, a bankrupt; that he has read the foregoing petition for reconsideration and rejection, and the facts therein stated are true except as to those matters or things therein stated on information or belief, and as to those matters, he believes it to be true.

CARROLL ALLEN.

Subscribed and sworn to before me this 10th day of May, 1909.

[Seal] MARGARET DARROW,
Notary Public in and for the County of Los Angeles, State of California.
[Notarial]

[Endorsed]: No. 173. In the District Court of the United States in and for the Southern District of California, Southern Division. In Bankruptcy. In

the Matter of the Estate of Fred Dorr, Bankrupt. Petition for Reconsideration and Rejection of the Claim of John J. Forbis. Filed May 11, 1909, at 4 o'clock P. M. Lynn Helm, Referee.

Exhibit No. 3.

[Stipulation of Agreed Facts Re Petition of Trustee.]

In the District Court of the United States in and for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 173.

In the Matter of the Estate of FRED DORR,
Bankrupt.

STIPULATION OF AGREED FACTS SUBMITTING THE PETITION OF THE TRUSTEE FOR THE RECONSIDERATION AND REJECTION OF THE CLAIM OF JOHN J. FORBIS, TO THE REFEREE.

The petition of the trustee, for the reconsideration and rejection of the claim of John J. Forbis is hereby submitted to the Honorable Lynn Helm, referee, on the following agreed statement of facts, together with said claim as filed.

I.

That John J. Forbis is a resident of Butte, Montana, and was during the months of June and July, 1908; that Fred Dorr, the bankrupt, was a stock-broker during said time, with an office in Butte, Montana, conducting a brokerage business where grain,

stocks and other securities were sold on margin, and otherwise.

II.

That on the 30th day of June, 1908, said John J. Forbis, purchased through said bankrupt, 300 shares of the common stock of the United Steel Corporation at $37.75, and 100 shares of said stock at $37.87½ per share, the total purchase price of all of said stock, amounting with commission to the sum of $15,162.50.

III.

That the only sum paid on account of said purchase was the sum of $3,864.35, which said sum said Forbis had on deposit with said Dorr at the date of said purchase and was applied on said purchase, leaving a balance due to said Dorr from said Forbis on account of said purchase of the sum of $11,258.15, for which amount said Dorr held said stock so purchased as security.

IV.

That said Dorr was at all the times herein referred to a member of the New York Stock Exchange where the orders of said Forbis were executed.

V.

That the value of said 400 shares of the common stock of the United Steel Corporation so purchased as aforesaid, was on the 12th day of August, 1908, $7,312.89, and that before said date said Dorr had, without the knowledge or consent of said Forbis, disposed of said stock.

VI.

That purchase and sale of said stock by said Forbis

and said Dorr were made subject to the following agreement signed by said Dorr and accepted by said Forbis, to wit:

"All orders for the Purchase and Sale of any article received and executed with the distinct understanding that Actual Delivery is contemplated, and the party giving the orders so understands and agrees.

It is further understood that on all credit business, the right is reserved to close transactions when credits are running out—or so nearly in our judgment, as to endanger the account—without further notice, and settle contracts in accordance with rules and customs of Exchange where order is executed."

VII.

That said purchases of stock were made by said Forbis through said Dorr, in Dorr's office in Butte, Montana, and said stock was never delivered to said Forbis.

VIII.

That the ledger page of said Dorr containing the account of said Forbis is hereby referred to and made a part hereof the same as if set out in full at this place.

Dated May 11th, 1909.

W. T. CRAIG,
Attorney for John J. Forbis.
HICKCOX & CRENSHAW,
Attorneys for Trustee.

[Endorsed]: No. 173. In the District Court of the United States in and for the Southern District

of California, Southern Division. In Bankruptcy. In the Matter of the Estate of Fred Dorr, Bankrupt. Stipulation of Agreed Facts Submitting the Petition of the Trustee for the Reconsideration and Rejection of the Claim of John J. Forbis. Filed May 11, 1909, at 4 o'clock P. M. Lynn Helm, Referee.

Exhibit No. 4.

[Certificate of Referee.]

In the District Court of the United States, Southern District of California, Southern Division.

IN BANKRUPTCY.

In the Matter of FRED DORR,

Bankrupt.

I, Lynn Helm, Referee in Bankruptcy of said court for the County of Los Angeles, to whom said cause was referred by a general order of reference herein entered on the 17th day of September, 1908, do hereby certify that in the course of the proceedings in said cause before me the following order was entered:

In the District Court of the United States, Southern District of California, Southern Division.

IN BANKRUPTCY—No. 173.

In the Matter of FRED DORR,

Bankrupt.

Order and Decree [of Referee] on Claim of John J. Forbis.

At a Court of Bankruptcy held in the city of Los Angeles, in said Southern District of California, Southern Division, before Lynn Helm, Referee in Bankruptcy, on the 23d day of December, 1909.

John J. Forbis having filed in the above-entitled matter his claim for $7,312.89, and said claim having been allowed December 11th, 1908, Carroll Allen, the trustee herein, filed a petition for the reconsideration and rejection thereof, upon the ground that said claim is based upon a marginal, gambling transaction in stock and that said claimant had no intention of completing the said purchase or sale of said stock, and that said claim is not enforceable by reason of the provisions of section 8416 of the Revised Codes of Montana in force at the time of the transaction on which said claim is based, and that said claim is based upon a sale of stock on margin, and that the contract for the purchase of said stock was illegal and void, being prohibited by public policy of the State of Montana, the State in which the said transaction was had upon which the claim was based.

The said petition for reconsideration and rejection of said claim having heretofore come on regularly to be heard upon the petition of the said trustee upon the claim of said Forbis as filed and upon the agreed statement of facts also filed herein; and Messrs. Hickcox & Crenshaw appearing for Carroll Allen, Trustee, and W. T. Craig as attorney for

claimant, the case having been argued and submitted to the Court for its consideration and decision and the Court having considered the proofs and arguments of Counsel and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED as follows: John J. Forbis is a resident of Butte, Montana, and was during the months of June and July, 1908; that Fred Dorr, the bankrupt, was a stockholder during that time with an office in Butte, Montana, conducting a brokerage business where grain, stocks and other securities were sold on margin and otherwise. The bankrupt was a member of the New York Stock Exchange and the Chicago Board of Trade and had correspondents in the cities of New York and Chicago, through whom he immediately did his business on the several Exchanges. These correspondents were also members of the several Exchanges abovementioned. The orders were executed by the bankrupt as a stockbroker and as a member of the New York Stock Exchange. This stock in question was purchased through his New York correspondent in his own name on the Stock Exchange. The purchase and sale of said stock by said Forbis and the said Dorr were made subject to the following agreement in writing by said Dorr and accepted by said Forbis, to wit: "All orders for the purchase and sale of any article received and executed with the distinct understanding that actual delivery is contemplated, and the party giving orders so understands and agrees. It is further understood that on all credit business, the

right is reserved to close transactions when credits are running out—or so nearly in our judgment as to endanger the account—without further notice, and settle contracts in accordance with rules and customs of exchange where order is executed."

By Article 23 of the Constitution of the New York Stock Exchange it is provided: "Section 8. Fictitious transactions are forbidden. Any party violating this rule shall be liable to suspension for a period not exceeding twelve months."

On the 30th day of June, 1908, said John J. Forbis purchased through said bankrupt three hundred shares of the common stock of the United Steel Corporation, at $37.75 per share and one hundred shares of stock of said corporation at $37.87½ per share, the total purchase price of all of said stock amounting, with commission to the sum of $15,162.50. That the only sum paid on account of said purchase was the sum of $3,864.35, which said sum said Forbis had on deposit with said Dorr at the date of said purchase, and was applied on said purchase, leaving a balance due to said Dorr from said Forbis on account of said purchase of the sum of $11,258.15, for which amount said Dorr held said stock so purchased as security.

The bankrupt, Dorr, was suspended on the New York Stock Exchange July 29, 1908, and all transactions of his on said Stock Exchange were closed under the rules.

The petition herein was filed on the 12th day of August, 1908. At that time the value of said four hundred shares of the common stock of the United

Steel Corporation, so purchased as aforesaid, was $18,750.00, and the stock having been sold by Dorr without the knowledge or consent of Forbis left a balance due Forbis of $7,312.89, for which he filed said claim.

Said stock was never delivered to said Forbis, but the orders of Forbis were executed on the New York Stock Exchange, of which the bankrupt was a member, as aforesaid.

The contention of the Trustee is that this transaction was in violation of the provisions of Section 8416 of the Revised Statutes of Montana, 1907.

"GAMBLING GAMES PROHIBITED.—Any person who carries on, opens up or causes to be opened, or who conducts or causes to be conducted, or operates, or runs, as principal, agent, or employee, any game of monte, dondo, fan-tan, tan, stud-horse poker, craps, seven and a half, twenty-one, faro, roulette, draw-poker, or the game commonly called round-the-table poker, or solo, or any banking or percentage game, or any game commonly known as a sure-thing game, or any game of chance played with cards, dice or any device whatever, or who runs or conducts or keeps any slot machine, or other similar machine, or permits the same to be run or conducted, for money, checks, credits, or any representative of value, or for any property or thing whatever, or any person or persons who conduct any brokerage business, bucket-shop or office where grain stocks or securities of any kind are sold on margins and any person owning or in charge of any saloon, beer hall, barroom, cigar store, or other place of business, or any

place where drinks are sold or served, who permits any of the games mentioned in this Section to be played in or about such saloon, beer hall, bar-room, cigar store, or other place of business, or permits any slot machine, or other similar machine to be kept therein, is punishable by a fine of not less than one hundred nor more than one thousand dollars, and may be imprisoned for not less than three months, nor more than one year, or by both such fine and imprisonment. (Act approved March 5, 1907, sec. 1.) (10th Sess., Chap. 115.) Montana Penal Code."

The contract in question is to be governed as to its nature, validity and interpretation by the law of the State of Montana where it was made.

The Montana Statutes are, no doubt, enacted for the purpose of preventing gambling in stocks as well as by other devices, and it is, therefore, necessary to determine whether or not this transaction is a gambling transaction, for if it is, it is in violation of not only the general law of the land, but as well the Montana Statute. The same rules that will determine whether or not it is a gambling transaction under the general law will also determine whether it is a gambling transaction under the laws of the State of Montana, for it must be determined in each case what was the purpose and intent of the parties in entering into the transaction. Whether or not a transaction is a gambling transaction can be determined in this case only by the circumstances under which it is had. In the absence of an express statute to the contrary, the general law of the land does not forbid contracts upon

margin or for the future delivery of any kind of personal property.

By the general law the true test of a contract of the kind in question is whether or not it could be settled by the payment of money and in no other way; or whether the parties selling could tender and compel acceptance of the particular commodity sold; or whether the party buying could compel the delivery of the commodity purchased.

It is well settled by the United States Courts that contracts for the future delivery of merchandise or tangible property of purchase made upon margins are not void unless the parties really intend and agree that the goods are not to be delivered, or the real intent of the parties is that they should merely speculate in the rise and fall of prices. Where one party is to pay the other the difference between the contract price and the market price of goods at the time fixed for executing the contract, then the whole transaction constitutes nothing more than a wager and is null and void. It is further well settled that the burden of proving such a transaction is illegal is upon the party who seeks to impeach it.

In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the difference between the contract and the market price.

A contract which is on its face one of sale with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of differences, rests with the party making the assertion.

On the face of a transaction such as this, it would appear that the transaction is legal, and the law does not, in the absence of proof presume that the parties are gambling. The proof must show that there was a mutual understanding that the transaction was to be a mere settlement of differences; in other words, a mere wagering contract.

If the transaction was a legitimate one for stocks that were to be delivered, and not a mere speculation of the rise and fall of the market, and was not what is known as a wagering contract, it was not void either under the general laws of the United States, or under the laws of Montana. There is no doubt that purchases on margins may be, and frequently are, used as a means of gambling for a great gain or a loss of all one has, but where the parties to a transaction had no intention of entering into a gambling transaction, as where the case is a single purchase of stock of a fixed value, yielding a regular income, it cannot be said that because he only paid part of the purchase price, or that he did not receive the stocks immediately in hand, but they were purchased through a broker doing business in the State of Montana, upon a Stock Exchange in the city of New York, and delivered to his agent in accordance with the rules thereof, that such a transaction is a gambling transaction, or comes within the inhibition of the laws of Montana.

It is the presumption of law that these parties intended a bona fide transaction. The notice from the broker was that the transaction in stock was to be made in conformity to the rules of the New York

Stock Exchange, and by those rules actual delivery is not only contemplated, but it becomes an essential feature of the transaction. All fictitious transactions are condemned, and any other course than actual delivery is in violation of the rules, and the member is liable to suspension.

The object of the Montana Statute is to prevent gambling. While it may be unlawful to conduct any brokerage business, bucket-shop or office where grain, stock or securities of any kind are sold on margins, the question still remains in each case whether the broker and his customer have entered into a bona fide transaction, or whether it was, in fact, simply a gambling transaction. In the absence of plenary proof to the contrary, this transaction must be held to be a bona fide transaction. There is no evidence in the record that there was any intention on the part of the parties that the transaction should be otherwise.

As conclusions of law herein I find that said claim of John J. Forbis is not based upon a marginal, gambling transaction in stock; that the transaction upon which said claim is based was not in conflict with section 8416 of the Revised Codes of Montana; that the contract for the purchase of said stock was not illegal or void or prohibited by public policy of the State of Montana; that said claim is a valid claim against the estate of said bankrupt and should be allowed, and that the petition to reconsider and reject the said claim for $7,312.89 should be denied;

It is therefore ORDERED, ADJUDGED AND DECREED that the petition of the Trustee herein

to reconsider and reject the claim of said John J. Forbis be and the same is hereby denied.

Dated December 23, 1909.

LYNN HELM,
Referee.

That afterwards on the 14th day of February, 1910, the Trustee herein, Carroll Allen, feeling aggrieved with said order, filed a petition for review thereof, which is as follows:

Exhibit No. 5.

[Petition to District Court for Review of Referee's Order.]

In the District Court of the United States in and for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 173.

In the Matter of the Estate of FRED DORR,
Bankrupt.

PETITION OF TRUSTEE FOR REVIEW OF REFEREE'S ORDER REJECTING TRUSTEE'S PETITION TO RECONSIDER AND REJECT CLAIM OF JOHN J. FORBIS.

Petitioner, Carroll Allen, is the duly elected, qualified and acting Trustee of the above-named bankrupt, Fred Dorr, and as such was a party to the following certain proceedings in said bankruptcy pending before Lynn Helm, Esq., as Referee in Bankruptcy in charge thereof, to wit:

That one John J. Forbis, having filed a claim in the above-entitled matter against the estate of said

Dorr, the same was on the 11th day of December, 1908, allowed for the sum of $7,312.89; that thereafter, to wit, on the 11th day of May, 1909, your petitioner, as such Trustee, filed a petition for the reconsideration and rejection of the claim of John J. Forbis.

Upon the hearing of said petition for the reconsideration and rejection of said claim of said John J. Forbis, a final order was made by said Referee, wherein the petition for reconsideration and rejection of said claim of John J. Forbis was denied, to which said final order petitioner excepts.

Said final order denying the petition for reconsideration and rejection of said claim by said Referee is erroneous in the following particulars, to wit:

I.

The following findings of fact by the Referee are not sustained by the agreed statement of facts or any evidence.

1st. That the stock purchased, upon which said Forbis bases his claim, was purchased through Dorr's New York correspondent, in his own name.

2nd. That the bankrupt had correspondents in the cities of New York and Chicago through whom he immediately did his business on the several exchanges.

3rd. That these correspondents were members of the several exchanges in New York and Chicago.

4th. That portion of the finding of fact purporting to set up certain rules of The New York Stock Exchange.

5th. That the bankrupt Dorr was suspended on The New York Stock Exchange July 29, 1908, and all transactions of his on said stock exchange were closed under the rules.

6th. That the same rules that will determine whether or not the Forbis transaction is a gambling transaction under the general law will also determine whether it is a gambling transaction under the laws of the State of Montana.

II.

The Referee erred in finding the following conclusions of law:

1st. That the claim of John J. Forbis is not based upon a marginal gambling transaction in stock;

2nd. That the transaction upon which said Forbis' claim is based was not in conflict with section 8416 of the Revised Codes of Montana;

3rd. That the said contract for the purchase of said stock was not illegal;

4th. That the said contract for the purchase of said stock was not void;

5th. That the said contract for the purchase of the said stock was not prohibited by the public policy of the State of Montana.

6th. That the said claim of said Forbis should be allowed.

III.

The Referee erred in not finding,

1st. That the claim of said Forbis was barred by the provisions of sec. 8416 of the Revised Codes of Montana.

2nd. That the contract between Forbis and Dorr, upon which said claim was based, was illegal and void, being prohibited by public policy of the State of Montana.

Wherefore, petitioner prays that said order of said Referee denying the Trustee's petition to reconsider and reject the claim of John J. Forbis, be reviewed and reversed.

CARROLL ALLEN,
Trustee for the Estate of Fred Dorr, a Bankrupt.
HICKCOX & CRENSHAW,
Attorneys for Trustee.

[Endorsed]: No. 173. In the District Court of the United States in and for the Southern District of California, Southern Division. In Bankruptcy. In the Matter of the Estate of Fred Dorr, Bankrupt. Petition of Trustee for Review of Referee's Order Rejecting Trustee's Petition to Reconsider and Reject Claim of Jno. J. Forbis. Filed Feb. 14, 1910, at 11 o'clock A. M. Lynn Helm, Referee.

Recd. copy of the within this 14th day of Feby., 1910.

W. T. CRAIG,
Atty. for Claimant.

Exhibit No. 6.

In the District Court of the United States, Southern District of California, Southern Division.

In the Matter of FRED DORR,

Bankrupt.

Stipulation [Re Stipulation of Facts].

It is hereby stipulated between the Trustee herein and John J. Forbis, claimant herein, that the facts stated in the Order and Decree made by Referee Lynn Helm in relation to the claim of said Forbis are true down to and including line 5, page 4; also that at the time of the bankruptcy of said Dorr said bankrupt did not have on hand nor in his possession any of the stock purchased by said claimant nor any stock of the same kind nor any money with which to purchase said stock.

HICKCOX & CRENSHAW,
Attorneys for Trustee.
W. T. CRAIG,
Attorney for Claimant, John J. Forbis.

[Endorsed]: No. 173. In United States District Court, Southern District of California, Southern Division. In the Matter of Fred Dorr, Bankrupt. Stipulation of Additional Facts. Filed June 20th, 1910, at 11:20 o'clock A. M. E. H. Owen, Clerk.

Exhibit No. 7.

[Order Affirming Order of Referee.]

Monday, 20th of June, 1910.
(January Term, A. D. 1910.)
Court met pursuant to adjournment.
Present: The Honorable OLIN WELLBORN, District Judge.

No. 173—BKCY. S. D.

In re FRED DORR,

Bankrupt.

This matter coming on this day to be further heard on a review of Referee's order in the matter of claim of John J. Forbis; and said matter having been argued by Ross T. Hickcox, Esq.; and a stipulation as to additional facts having been presented and filed herein; and court having thereupon, at the hour of 12:05 o'clock, P. M., taken a recess until the hour of 2 o'clock, P. M., of this day;

And now, at the hour of 2 o'clock, P. M., court having reconvened; and said matter having been further argued by Ross T. Hickcox, Esq., and having also been argued by W. T. Craig, Esq., and court having, at the hour of 3:30 o'clock, P. M., taken a recess for 5 minutes; and now, at the hour of 3:35 o'clock, P. M., court having reconvened; and said matter having been further argued by E. S. Williams, Esq., of counsel for the Trustee; and said matter having been further argued by W. T. Craig, Esq., and by Ross T. Hickcox, Esq., and having been submitted to the court for its consideration and decision; and the court having duly considered the same and being fully advised in the premises; it is now by the court ordered that the order of the Referee in the Matter of the Claim of John J. Forbis be, and the same hereby is affirmed, to which ruling of the court Ross T. Hickcox, Esq., asks that exceptions be, and they hereby are noted herein.

[Certificate of Clerk District Court to Record.]

I, E. H. Owen, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true

and correct copy of the original: Claim of John J. Forbis, Petition for Reconsideration, Stipulation of Facts, Order and Decree of Referee, Petition by Trustee to Review Order of Referee, Second Stipulation of Facts filed in this Court, Minute Order of U. S. District Court affirming Referee's Decision; all filed of record in my office in the matter of Fred Dorr, No. 173—Bkcy. So. Div.

Attest my hand and seal of said District Court, this 24th day of June, A. D. 1910.

[Seal] E. H. OWEN,
Clerk.

By ————————,
Deputy Clerk.

[Verification of Petition for Revision.]

United States of America,
State of California,
Southern District,
County of Los Angeles,—ss.

Carroll Allen, being first duly sworn, on his oath says: That he is the duly appointed, qualified and acting trustee of the Estate of Fred Dorr, a bankrupt; that he knows the contents of the foregoing petition for review, and the same is true as he believes.

CARROLL ALLEN.

Subscribed and sworn to before me this 27th day of June, 1910.

[Seal] DAISY ROBERTS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals in and for the Ninth Circuit. In Bankruptcy. In the Matter of the Estate of Fred Dorr, a Bankrupt. Petition of Trustee for Review of Order Affirming Decision of Referee Rejecting Trustee's Petition to Reconsider and Reject Claim of John J. Forbis.

Reced. copy of within Petition for Review June 27th, 1910.

W. T. CRAIG,
Atty. for Claimant, John J. Forbis.

CERTIFIED COPY.

In the District Court of the United States in and for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 173.

In the Matter of the Estate of FRED DORR,
a Bankrupt.

Certified Copy Order Allowing Petition for Revision and That Clerk Prepare Record.

Whereas, Carroll Allen, Trustee of the Estate of Fred Dorr, a bankrupt, feels aggrieved by an order entered herein on the 20th day of June, 1910, and the Court being satisfied that the questions therein determined are questions of which revision may be asked, as provided in Section 24b of the Bankruptcy Act of 1898, and that the application should be granted; on motion of Hickcox & Crenshaw, Attorneys for said Trustee,—

It is ordered that the order of this Court made and entered herein on the 20th day of June, 1910, confirming the order of the Referee entered herein on the 28th day of December, 1909, and said order of said Referee, be revised in matter of law by the Circuit Court of Appeals of the Ninth Circuit of the United States, as provided by Section 24b of the Bankruptcy Act of 1898 and the rules and practice of that Court; that the Clerk of this Court prepare, at the expense of the petitioner, a certified copy of such order and a record of this case pertinent to such order.

OLIN WELLBORN,
Judge.

Witness, the Honorable OLIN WELLBORN, Judge of said Court, and the seal thereof, at the City of Los Angeles, in said District, on the 25th day of June, 1910.

[Seal] E. H. OWEN,
Clerk.

I, E. H. Owen, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the original: Order Allowing Petition for Revision and that Clerk Prepare and File Record, as filed of record in my office on June 25th, 1910, in the Matter of Fred Dorr, Bankrupt, No. 173, So. Div.

Attest my hand and seal of said District Court, this 27th day of June, A. D. 1910.

[Seal] E. H. OWEN,
Clerk.
By W. C. Hart,
Deputy Clerk.

[Endorsed]: Certified Copy. No. 173. In the District Court of the United States in and for the Southern District of California, Southern Division. In Bankruptcy. In the Matter of the Estate of Fred Dorr, Bankrupt. Order Allowing Petition for Revision and that Clerk Prepare and File Record. Filed June 25th, 1910, at 45 min. past 11 o'clock A. M. E. H. Owen, Clerk. By ————, Deputy Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

IN BANKRUPTCY.

In the Matter of the Estate of FRED DORR,
a Bankrupt.

Stipulation as to Record.

It is hereby stipulated by and between Carroll Allen, Trustee of the Estate of Fred Dorr, a bankrupt, petitioner, and John J. Forbis, a claimant, that the record of the proceedings attached to the petition for review in the above-entitled matter is a full, true and correct copy of the proceedings in the United States District Court in and for the Southern District of California, Southern Division, con-

cerning the claim of said Forbis, and that the said petition for review may be heard on said record.

Dated June 27th, 1910.

HICKCOX & CRENSHAW,
Attorneys for Petitioner.
W. T. CRAIG,
Attorney for Claimant.

[Endorsed]: Original. In the United States Circuit Court of Appeals in and for the Ninth Circuit. In Bankruptcy. In the Matter of Fred Dorr, a Bankrupt. Stipulation as to Record.

[Endorsed]: No. 1873. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Estate of Fred Dorr, a Bankrupt. Carroll Allen, Petitioner, vs. John J. Forbis, Claimant, Respondent. Transcript of Record. Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of a Certain Order of the United States District Court for the Southern District of California, Southern Division.

Filed June 29, 1910.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 1873.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In re
FRED DORR,
a Bankrupt.

Carroll Allen, Trustee,
Petitioner,
vs.
John J. Forbis,
Respondent.

BRIEF FOR RESPONDENT.

W. T. CRAIG,
Attorney for Respondent.

Parker & Stone Co., Law Printers, 223 New High St., Los Angeles, Cal.

No. 1873.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In re
FRED DORR,
a Bankrupt.

Carroll Allen, Trustee,
Petitioner,
vs.
John J. Forbis,
Respondent.

BRIEF FOR RESPONDENT.

The statement of the case contained in the brief for petitioner perhaps covers all of the agreed facts, but the following facts are so important for respondent's case that we desire to call attention to them in the exact language used in the stipulation of facts. This language is as follows:

"The bankrupt was a member of the New York Stock Exchange, and the Chicago Board of Trade, and had correspondents in the cities of New York and Chicago, through whom he immediately did his business on the several exchanges. These correspondents were also members of the several exchanges above mentioned. The orders were executed by the bankrupt as a stockbroker and as a member of the New York Stock Exchange. This stock in question was purchased through his New York correspondent in his own name on the stock exchange."

The claim of respondent was allowed by Hon. Lynn Helm, referee in bankruptcy, and thereafter a petition was filed by the trustee herein asking that the allowance of the claim be reconsidered and that the same be disallowed. This petition was denied by the referee. Upon a review of this decision of the referee the district court affirmed the referee.

Respondent presented both to the referee and to the district judge on review several arguments which to counsel for respondent seemed sufficient to warrant the decision of the referee. The referee denied the petition of the appellant upon one of the grounds argued by respondent and the learned district judge affirmed the referee upon another ground, without, however, expressing any opinion upon the position taken by the referee.

We will present to this court, first, the position approved by the learned district judge, because, in our opinion, it is so determinative of the questions involved in this petition for revision that this court, like the district judge, need not consider the other questions involved.

The bankrupt, Dorr, having purchased the Stock for respondent on the New York Stock Exchange, and having disposed of the stock prior to bankruptcy, became a stakeholder for respondent, and must pay over to respondent.

Appellant contends that respondent's claim is based on his contract with Dorr; that said contract, being a marginal transaction, is in violation of the Montana statute, and, therefore, respondent cannot recover. But respondent's claim is not based on any contract, but is for a balance in the hands of Dorr after a sale of respondent's stock had been made by Dorr. The claim is for a "balance due claimant," and the statement of account attached to the claim shows the amount of this balance. [Tr. p. 6.] At the time of the bankruptcy Dorr did not possess respondent's stock, but, on the contrary, had received the proceeds from its sale. He was, therefore, a mere stakeholder for respondent, and it was immaterial what the character of the original transaction was between respondent and Dorr. It being admitted that Dorr had in his possession, or that he should have had in his possession, the proceeds from the sale of stock belonging to respondent, the court will not permit Dorr or his successor in interest, the trustee in bankruptcy, to refuse to pay this fund over to the party entitled to receive it by pleading illegality of a transaction which had nothing to do with the fund in Dorr's hands at the time of the bankruptcy. This principle was first announced by the Supreme Court of the United States in the case cited by appellant, to-wit: The Planters Bank v. Union Bank, 16 Wallace, 483. The doctrine was there laid down, and it has been followed in

many cases since, that "when the illegal contract has been consummated; where no court has been called upon to give aid to it; when the proceeds of a sale have been actually received, and received in that which the law recognizes as having value, the fund can be recovered by the party entitled to it." It is true, as stated by appellant, that the learned district judge could see no distinction between the Planters Bank case and the case at bar, but there were other cases cited to the district judge which even more fully covered the legal proposition involved. The case of MacDonald v. Lund, 13 Wash. 412, 43 Pac. 348, fully reviews the cases upon this question. The court in that case says:

"This distinction, namely, the difference between suing or trying to enforce the contract itself in a suit to recover money which is admitted to be due, although it may have been obtained in prosecuting an illegal enterprise, has always been respected by the courts from its announcement in the case above cited up to the present time."

The case of Overholt v. Burbridge *et al.,* 28 Utah 408, 79 Pac. 561, is one on all fours with the Dorr case. Defendants, stockbrokers in Salt Lake City, upon order of the plaintiff sold short through Wendt & Co., of New York City, certain stock. The deal was closed at a profit of $1011.75 after deducting commissions and dividends. The customer sued the brokers for the fund in their hands and the brokers defended upon the ground that the fund was the product of a gambling transaction. The court in this case says:

"This action was not commenced to enforce the con-

tract pleaded as a defense, but to recover money held on deposit for the plaintiff, and to which the defendants do not assert any title, their sole defense being that the portion of the money in question was obtained from Wendt & Co., through a wagering contract which was illegal and against public policy, plaintiff ought not to be permitted to recover, and that they be permitted to retain that which they confess belongs to the plaintiff. * * * The authorities uniformly hold that where an illegal contract has been fully executed and the interests and differences of the parties to it adjusted and agreed upon, and the money arising therefrom deposited to the credit of one or more of the respective party or parties to whom the money is due, such depositary cannot, when sued by the party or parties, to whom the money is due, successfully plead the illegality of the contract or transaction through which the money was originally obtained."

In Gilliam v. Brown, 43 Miss. 641, it was decided that it was well settled that after the illegal contract had been executed one party in possession of all the gains and losses resulting from the illicit traffic and transactions, would not be tolerated to interpose the objection that the business which produced the fund was in violation of law.

As was said by Mr. Helm, the referee, in his opinion deciding the same question involved in a claim of another creditor of the bankrupt, Dorr:

"After the sale of the stock and the receipt of the money by the bankrupt or to his credit, the bankrupt was simply a depositary of the money due to the claimant,

and to allow the bankrupt or this estate to keep this money because it is claimed the owner of it had, perchance, violated some law in the original transaction from which it was derived, would be absolutely inequitable and a species of legalized robbery. * * * It is not an answer to this proposition to say that a new promise made after the illegal transaction has been wholly completed is necessary to sustain a suit for the recovery of the proceeds derived from the sale of the stock. The law from the naked fact will imply a promise without going into the illegal transaction, if any such there was. Floyd v. Patterson, 72 Tex. 202. The money derived from this transaction, which had been fully executed, could have been recovered from the broker in an action at law if bankruptcy had not intervened, even if the original transaction should have been found to have been illegal."

The Montana statute is aimed at the business of a bucketshop and is intended for the protection of the public. The Parties are not in pari Delicto, and the transaction at Bar was not prohibited by the statute.

The learned referee in his opinion sustaining the claim of respondent very fully covered the question of the illegality of the contract, and we quote as follows from his opinion:

"In the absence of an express statute to the contrary, the general law of the land does not forbid contracts upon margin or for the future delivery of any kind of personal property. By the general law the true test of a contract of the kind in question is whether or not it could be settled by the payment of money, and in no other way;

or whether the parties selling could tender and compel acceptance of the particular commodity sold; or whether the party buying could compel the delivery of the commodity purchased. It is well settled by the United States courts that contracts for the future delivery of merchandise or tangible property or purchases made upon margins, are not void unless the parties really intend and agree that the goods are not to be delivered, or the real intent of the parties is that they should merely speculate in the rise and fall of prices. Where one party is to pay the other the difference between the contract price and the market price of goods at the time fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. It is further well settled that the burden of proving that such a transaction is illegal is upon the party who seeks to impeach it. Roundtree v. Smith, 108 U. S. 269; Dykers v. Townsend, 24 N. Y. 57; Bibb v. Allen, 149 U. S. 481, 492; Irwin v. Williar, 110 U. S. 499, 508. In Clews v. Jamieson, 182 U. S. 461, 489, this same doctrine is repeated, and there Mr. Justice Peckham, in delivering the opinion of the court, said: 'As a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, it must be shown by him who attacks it that it was not intended to deliver the article sold, and that nothing but the difference between the contract and the market price was to be paid by the parties to the contract.' * * *"

The referee then continues:

"On the face of a transaction such as this, it would appear the transaction is legal, and the law does not, in

the absence of proof, presume that the parties are gambling. The proof must show that there was a mutual understanding that the transaction was to be a mere settlement of differences; in other words, a mere wagering contract." Citing

Parker v. Moore, 115 Fed. 789, and
Cleage v. Laidley, 149 Fed. 346, 352.

"It is said by the Supreme Court of the state of Pennsylvania, *In Re* Taylor & Co.'s Estate, 192 Pa. St. 304, 43 Atl. 973, that 'It has been settled by this court so often that it ought not to require reiteration, that dealing in stocks, even on margins, is not gambling. Stocks are as legitimate a subject of speculating, buying and selling, as flour or drygoods or pig iron. * * * Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, did he intend to buy or only to settle on differences? If he had bought and paid for his stock, held it for a year and then sold, no one would call it gambling; and yet it is just as little so if he had had it but an hour, and sold before he had in fact paid for it. So with selling.'" Citing also

Peters v. Grimm, 149 Pa. St. 163.

The referee then continues:

"If the transaction was a legitimate one for stocks that were to be delivered, and not a mere speculation upon the rise and fall of the market, and was not what is known as a wagering contract, it was not void either under the general laws of the United States, or under the laws of

Montana. There is no doubt that purchases on margins may be, and frequently are, used as a means of gambling for a great gain or loss of all one has, but where the parties to a transaction had no intention of entering into a gambling transaction, as where the case is a single purchase of stock of a fixed value, yielding a regular income, it cannot be said that because he only paid part of the purchase price, or that he did not receive the stocks immediately in hand, but they were purchased through a broker doing business even in the state of Montana, upon a stock exchange in the city of New York, and delivered to his agents in accordance with the rules thereof, such a transaction is a gambling transaction, or comes within the inhibition of the laws of Montana. It is the presumption of law that these parties intended a *bona fide* transaction. The notice from the broker was that the transaction in stock was to be made in conformity to the rules of the New York Stock Exchange, and by those rules actual delivery is not only contemplated, but it becomes an essential feature of a transaction. All fictitious transactions are condemned, and any other course than an actual delivery is in violation of the rules, and the member is liable to suspension. The object of the Montana statute is to prevent gambling. While it may be unlawful for any person to conduct any brokerage business, bucketshop or office where grain, stock or securities of any kind are sold on margins, the question still remains in each case whether the broker and his customer have entered into a *bona fide* transaction, or whether it was, in fact, simply a gambling transaction. Under the rules laid down in Clews v.

Jamieson, *supra,* 491, 492, in the absence of plenary proof to the contrary, this transaction must be held to be a *bona fide* transaction. There is no evidence in the record that there was any intention on the part of the parties that the transaction should be otherwise. It is, therefore, valid, and the claim will be allowed, and the petition to reconsider and reject the claim which has been heretofore allowed for $7,312.82 will be denied. Lynn Helm, referee."

As the act prohibiting gambling is a penal one, it should be strictly construed, and all sections of the same should be construed in relation to its title, *i. e.,* "Gambling Games Prohibited." This act strikes at the occupation of the gambler, and is intended for the protection of the public against it. In such a case, where the act prohibits an occupation as being against good morals, and is made penal, such acts are construed in a manner to protect the public and to inflict punishment, if possible, only upon the man who conducts the occupation which is prohibited.

"It would seem that, when a statute imposes a penalty for the doing of an act, and singles out as the object of its prohibition one of the parties to the transaction, or has in mind only one particular person or class of persons as intended to be affected thereby and punished by it, it will not, in the absence of an express declaration that contracts involving a disregard or breach of its provisions shall be affected by illegality, be construed as producing that result, especially where the effect would be to prejudice honest claims and permit dishonest defenses. The court will not ignore, in arriving at a

conclusion upon this question arising under a particular act, the whole language and subject-matter of the same, the evil it is intended to remedy or prevent, the purposes which it seeks to accomplish; and while adhering to the rule of refusing its aid to one whose cause of action is founded upon a prohibitive transaction, even with the consent of the parties, it will not extend the rule so far as to encourage violations of contracts for the payment of honest debts as between the parties because they grew out of tainted originals."

Endlich on Interpretation of Statutes, Sec. 458.

"Where an act is prohibited by statute and a penalty for a violation of the statute is imposed upon one of the parties only, the parties are not in *pari delicto*."

Keener on Quasi Contracts, p. 274.

Inasmuch as the Montana statute refers exclusively to gambling games, and inasmuch as the sale of stock on margin is only a gambling game when it is the intention of the parties to settle the differences in cash, and inasmuch as it is absolutely settled by federal decisions that the buying and selling of stocks on margin where actual delivery is contemplated is not a gambling transaction, the Montana statute must receive such a construction as will make it applicable alone to gambling transactions. In this manner the clause becomes germane to the title of the act, which is "Gambling Games Prohibited," and also to the other clauses, which are fantan, poker, craps, roulette, etc. Doubtless the intent of the Montana statute was to prohibit the business of conducting a bucketshop. A bucketshop is a place where a

person bets upon the rise and fall of the market, where no actual purchases are made. The transaction of respondent was, of course, an actual purchase of stock on the New York Stock Exchange and an actual delivery. The court found that the transaction was not a gambling transaction, and this finding is supported by all of the decisions upon the subject. There are no Montana decisions construing the statute under discussion. If, therefore, this statute is strictly construed it must be held as not referring to legitimate and valid contracts in which the element of gambling does not enter. In other words, it cannot be said that the Montana statute defines all sales of stock on margin as being gambling transactions.

It is also urged upon the court's attention that the forum being the United States court, it should acquiesce, if possible, in the general trend of the federal decisions. Upon matters of commercial law, public policy and other matters of general public concern, the United States courts will follow their own decisions and adopt their own views so as to give uniformity to law irrespective of the state decisions to the contrary. As stock passes by delivery and is used as collateral security in all classes of commercial transactions, and as the securities represent in the aggregate more than one-half of the total wealth of the nation, the rule in relation to commercial paper should be applied and followed.

The rule that the federal courts should follow the state courts,

"Does not extend to contracts and other instruments of a commercial nature, the true interpretation and

"Where you have a word which may have a general meaning wider than that which was intended by the legislature, when you find it associated with other words which show the category within which it is to come, it is cut down and overridden according to the general proposition which is familiarly described as the *ejusdem generis* principle."

Beal on Cardinal Rules of Legal Interpretation, p. 315.

See also

Pages 279-314.

"It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated."

Lewis' Sutherland Statutory Construction, Sec. 422.

See also

Secs. 135, 256, 347, 370, 376, 379, 381, 423-434 and Sec. 527.

Hawaii v. Mankichi, 190 U. S. 197;

U. S. v. Kirby, 7 Wall 482;

U. S. v. Wilson, 58 Fed. 768;

State v. Schumann, 133 Mo. 111;

Leinkauf v. Banes, 66 Miss. 207;

State v. Walsh, 43 Minn. 444.

effect whereof are to be sought not in the decisions of local tribunals but in the general principles and doctrines of commercial jurisprudence; undoubtedly the decisions of local tribunals are entitled to and will receive the most deliberate attention and respect of this court, but they cannot furnish positive rules or conclusive authority by which our judgments are to be bound up and governed."

Swift v. Tyson, 16 Peters 1-19.

See also

R. R. v. Lockwood, 17 Wall. 357;
Washburn v. Insurance Co., 179 U. S. 1.

In Hartford Insurance Co. v. R. R., 70 Fed. 201, the federal court had before it a question of public policy involving a stipulation for a release from liability of negligence. The court said:

"It (*i. e.,* Iowa decision) constitutes an authoritative construction of the statutes of the state * * * and a very persuasive authority that the contract here in question is not contrary to public policy. Upon this question, however, it is not conclusive upon national courts. Whether or not such a provision of a contract is against public policy is a question of general law and not dependent upon any local usage or statute. Over this question the national courts exercise concurrent jurisdiction with those of the state, and while the decisions of the latter are always entitled to the weight of persuasive authority, the federal courts must in the end exercise its own judgment."

See also

Ward v. Vosburg, 31 Fed. 12;
Leaham v. Fields, 37 Fed. 842.

The contract between Dorr and respondent was not executed in Montana, but was executed in New York, and is to be construed according to the laws of New York, where marginal transactions are valid.

The Montana statute provides for the punishment of "any person or persons who conduct any brokerage business, bucketshop or office where grain, stocks or securities of any kind are sold on margins." The stipulated facts are "that said Dorr was at all the times herein referred to a member of the New York Stock Exchange, where the orders of said Forbis were executed." "This stock in question was purchased through his New York correspondent in his own name on the stock exchange." "Said stock was never delivered to said Forbis, but the orders of Forbis were executed on the New York Stock Exchange, of which the bankrupt was a member, as aforesaid."

It is true that Forbis gave an order for the purchase of stock to Dorr, which Dorr transmitted to his broker in New York, and the broker in New York purchased the stock there. This did not involve any sale of any stock on margin or otherwise in the state of Montana. The transaction was consummated in the state of New York. The Montana statute, even if it covered such transactions, as is involved in this case, only prohibits sales of stock on margin in Montana.

In New York sales on margins or for future delivery are valid. The only statute in force in New York restricting such sales was repealed in 1858.

Circumstances almost identical were involved in an action before the Supreme Court of the state of Mis-

souri, in the action of Gaylord v. Duryea, 95 Mo. App. 574, 69 S. W. 607. The defendant in this action opened an account with plaintiff's firm in St. Louis, Mo., and ordered the purchase of certain stock. The orders were executed in New York through a brokerage firm there, by means of telegrams, letters or otherwise. Suit was brought to recover the balance due after exhaustion of margins and for commissions. The defense set up was, "that all of the transactions were illegal and void as against public policy because they were wagers upon the rise and fall of the market." The court upon these facts said:

"As this case comes before us, it strikes us as easy of solution. It is an action at law, and each side of the issues of fact having been supported by the testimony, the finding of the Circuit Court thereon is conclusive. No points are made in regard to the admission or exclusion of evidence, and our investigation must be confined to the correctness of the legal theories adopted by the trial court. But it is unnecessary to set out all of the declarations of law which were given or refused, as they related to the effect of a purely speculative intention on the part of the defendant, and the purchases of stock were all made in New York City by the correspondents of the plaintiff, in obedience to telegraphic orders sent by the latter, and, therefore, constituted New York contracts, to be governed by the laws of that state in respect to their legality, and not by our statutes."

Gaylord v. Duryea, 95 Mo. App. 574, 69 S. W. 607.

See also

Champion v. Wilson & Co., 64 Ga. 184;
Postal Tel. Co. v. Lathrop, 33 Ill. App. 400.

Reference is made to the case of Bears v. Wardell, 199 Mass. 242, 85 N. E. 462. This also was a case very similar to the one at bar.

Plaintiff sought to recover of defendants certain margins which he had delivered to defendants as stock-brokers, invoking the following law in the state of Massachusetts:

"Chapter 99 of Gaming, Section 4. Whoever upon credits or upon margin contracts to buy or sell, or employs another to buy or sell for his account, any securities or commodities, intending at the time that there shall be no actual purchase or sale, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made, if such other party to the contract or person so employed had reasonable cause to believe that such intention existed."

In this case the stock was purchased at Boston at the branch house of McClean & Co., of New York City. The sales were cleared through the New York exchange. The court said:

"This is an action to recover the payments made and value of securities delivered to the defendant, a stock-broker, as margins for the purchase and sale of stock. We are inclined to the view that there was evidence which, taken at its full weight, supports the conclusions that the relation between the plaintiff and defendant was

that of principal and agent, and that this action comes under the second branch of the statute and that the plaintiff employed the defendant as his agent to go to New York and there make the several purchases of stock on account of which the payments now sought to be recovered, were made. The revised laws, chapter 74, section 7, *supra,* governs only contracts made in this state. Revised laws, chapter 99, section 4, *supra,* does not provide that the validity of the contracts there described shall depend upon the law of this jurisdiction unless they are made here, but leaves their legality to stand or fall upon a law of the place where the contract is made. No evidence was introduced as to the law of New York. Hence it must be assumed to be the same as the common law of this commonwealth. The method of purchase, sale and delivery of stock disclosed in this record as obtaining in the Consolidated Stock Exchange, assuming that the transactions were genuine, may have been found to be valid at common law, and, therefore, valid in New York."

Bears v. Wardell, 199 Mass. 242, 85 N. E. 462.

The case of Ward v. Vosburg, 31 Fed. 12, cited *supra,* was one where a Chicago broker sued a resident of Wisconsin in the United States Circuit Court for the Eastern District of Wisconsin for commissions and advancements. The orders of the plaintiff had been transmitted from Wisconsin by telegrams and letters and had been executed in Chicago. The court in that case said:

"Upon a careful perusal of the opinion of the court in Barnhard v. Backhouse, 52 Wis. 597, and of the record and testimony in that case submitted by counsel

for the defendant, I am strongly inclined to the opinion that if the case in judgment involved a Wisconsin transaction, arising under the Wisconsin statute, that opinion might be considered a controlling authority here. * * * The weight of authority is all one way as applied to Illinois transactions, namely, that a simple option reserved by the seller to himself as to the time of delivery of the property within certain limits, and the settlement of differences upon such contracts, does not make the contract void as a gambling transaction. The proofs must go farther and affirmatively show that it was not the intention of either the seller or the buyer when the contract was made to deliver any property."

Ward v. Vosburg, 31 Fed. 12.

See also

Layman v. Fields, 37 Fed. 852.

Contracts in Montana are to be interpreted according to the law and usage of the place where they are to be performed. The stipulated facts in this case show that the contract entered into between respondent and appellant was to be executed in the state of New York, and, therefore, the contract made between them is to be interpreted according to the law of New York.

"Law of Place. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or if it does not indicate a place of performance, according to the law and usage of the place where it is made."

Revised Codes of Montana, 1907, Sec. 5035 (C. C. Sec. 2211).

It is respectfully submitted for all the reasons given herein that the judgment of the referee and district judge were correct and should be affirmed.

W. T. CRAIG,
Attorney for Respondent.

No. 1873

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In re FRED DORR,
a Bankrupt,

CARROLL ALLEN, Trustee,
Petitioner,

vs.

JOHN J. FORBIS,
Respondent.

BRIEF FOR PETITIONER

HICKCOX & CRENSHAW,
Attorneys for Petitioner.

The Neuner Co., Los Angeles, Cal.

No. 1873

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In re FRED DORR,
a Bankrupt,

CARROLL ALLEN, Trustee,
Petitioner,
vs.
JOHN J. FORBIS,
Respondent.

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

This case comes before this court upon the petition for a revision of a certain order of the United States District Court for the Southern Division of the Southern District of California, affirming an order of the Referee in Bankruptcy, denying a petition of Carroll Allen, Trustee of the estate of Fred Dorr, a bankrupt, to reconsider a certain claim of one John J. Forbis, which had heretofore been allowed.

The facts are all stipulated, and are as follows:

That John J. Forbis is a resident of Butte, Montana,

and was during the months of June and July, 1908; that Fred Dorr, the bankrupt, was a stockbroker during said time, with an office in Butte, Montana, conducting a brokerage business where grain stocks and other securities were sold on margin, and otherwise.

That on the 30th day of June, 1908, said John J. Forbis purchased through said bankrupt, 300 shares of the common stock of the United Steel Corporation at $37.75, and 100 shares of said stock at $37.87½ per share, the total purchase price of all of said stock amounting, with commission, to the sum of $15,162.50.

That the only sum paid on account of said purchase was the sum of $3,864.35, which said sum said Forbis had on deposit with said Dorr at the date of said purchase and was applied on said purchase, leaving a balance due to said Dorr from said Forbis on account of said purchase, of the sum of $11,258.15, for which amount said Dorr held said stock so purchased as security.

That said Dorr was at all times herein referred to a member of the New York Stock Exchange where the orders of said Forbis were executed.

That the value of said 400 shares of the common stock of the United Steel Corporation so purchased as aforesaid, was on the 12th day of August, 1908, $18,750.00, and that before said date said Dorr had, without the knowledge or consent of said Forbis, disposed of said stock.

That at the time of the bankruptcy, said Dorr did not have on hand nor in his possession, any of the stock

purchased by said claimant, nor any stock of the same kind, nor any money with which to purchase said stock.

That purchase and sale of said stock by said Forbis and said Dorr were made subject to the following agreement signed by said Dorr and accepted by said Forbis, to-wit:

"All orders for the Purchase and Sale of any article received and executed with the distinct understanding that Actual Delivery is contemplated, and the party giving the orders so understands and agrees. It is further understood that on all credit business, the right is reserved to close transactions when credits are running out —or so nearly in our judgment, as to endanger the account—without further notice, and settle contracts in accordance with rules and customs of Exchange when order is executed."

That said purchases of stock were made by said Forbis through said Dorr, in Dorr's office in Butte, Montana, and said stock was never delivered to said Forbis.

Article 23 of the Constitution of the New York Stock Exchange provides:

"SECTION 8. Fictitious transactions are forbidden. Any party violating this rule shall be liable to suspension for a period not exceeding twelve months."

That the ledger page of said Dorr containing the account of said Forbis is referred to and made a part of the evidence herein.

That the bankrupt, Dorr, was suspended on the New York Stock Exchange, July 29, 1908, and all transactions

of his on said Stock Exchange were closed under the rules thereof.

That the petition to have Dorr declared a bankrupt was filed on August 12, 1908, at which time the value of said 400 shares was $18,750.00.

The questions involved in this petition for review are as follows:

First: Was the said purchase of the stock by Forbis a purchase of stock on margin?

Second: Do the provisions of Section 8416 of the Revised Codes of Montana prohibit the purchase and sale of stock on margin?

Third: Does said Section 8416 of the Revised Codes of Montana establish the public policy of said state against the purchase and sale of stock on margin?

Fourth: Was the purchase of said stock by said Forbis such a marginal sale as is prohibited by the provisions of Section 8416 of the Revised Codes of Montana?

Fifth: Was the purchase of said stock by said Forbis such a marginal sale as is prohibited by the public policy of the State of Montana?

Sixth: Was the purchase of said stock by said Forbis a marginal gambling transaction in stock?

Seventh: Does the fact that Dorr resold the stock purchased by Forbis on margin before he was ordered to do so by Forbis allow Forbis to recover on his contract if such contract was illegal or prohibited by the public policy of the State of Montana?

The errors relied upon by petitioner upon this petition for review are as follows:

First: In holding that said claim of John J. Forbis was not based upon the contract for the purchase of stock on a margin.

Second: In holding said claim was not founded upon a marginal gambling transaction in stock.

Third: In holding that the contract of purchase upon which said claim is based is not in conflict with the provisions of Section 8416 of the Revised Codes of the State of Montana.

Fourth: In holding that the contract upon which said claim is based was not illegal.

Fifth: In holding that said claim was not barred by Section 8416 of the Revised Statutes of the State of Montana.

Sixth: In holding that the contract upon which said claim is based was not void.

Seventh: In holding that the contract upon which said claim was founded was not prohibited by the public policy of the State of Montana.

Eighth: In holding that said Forbis was entitled to have said claim allowed notwithstanding the provisions of said Section 8416 of the Revised Codes of the State of Montana.

The transaction between the Respondent Forbis, and the Bankrupt Dorr, in Dorr's office in Butte, Montana, on June 30, 1908, was a purchase of stock on margin.

On June 30, 1908, the respondent, in the office of

Dorr, where stocks were sold on margin, bought 400 shares of the common stock of the United Steel Corporation, the purchase price being $15,162.50, the paid on account of said stocks the sum of $3,864.35, leaving a balance due Dorr thereon, in the sum of $11,258.15, for which last sum Dorr held said 400 shares of stock as security, with the right to sell the same without notice, if, in Dorr's judgment, the credit was running out (or in other words, the margin was being wiped out by a fall in the market). (Tr. pp. 12-13).

That this is a purchase of stock on margin there can be no doubt.

What is a sale of stock on margin? To answer this question correctly we must determine the legal definition of the word "margin."

"Margin" is a sum of money, or other security, deposited with a broker by a customer as a portion of the purchase or sale price of stocks, as security for the broker to protect him against the fluctuations of the market, while the customer decides to one of three things he may do with his contract:

First: (a) If the customer bought the stock, he may sell it; or (b), if the customer sold the stock, he may buy it in to cover;

Second: (a) If the customer purchased stocks he may receive it by paying the balance of purchase price; or (b), if a customer sold, he may deliver;

Third: The customer may allow, or the broker may decide to close out his contract by either a purchase or sale, if the market has not been in his favor.

In any event, the broker is protected, as his contract allows him to close transactions, i. e., contracts for purchase or sale when margin gets so small that the danger line is being reached as far as the security the broker has on deposit.

The form of contract, or bought and sold note, of each broker is different in language, but all have the legal effect of allowing the broker to sell out his customer when his margin becomes, in the broker's judgment, too small for safety.

The form used by Dorr was as follows:

"It is further understood on all credit business, the right is reserved to close transactions when credits are running out—or so nearly so in our judgment, as to endanger the account—without further notice, and settle contracts in accordance with rules and customs of exchange when orders are executed." (Tr. p. 13.)

The Supreme Court of the State of California, in the case of Sheehy v. Shinn, 103 Cal. 325, opinion by Beatty, C. J., has given the definition of "margin," quotation from page 330:

"The meaning of the word 'margin,' as ordinarily used in connection with stock sales, has long been well understood. As most frequently employed in this state at the time of, and for many years prior to, the adoption of the constitution, it meant the sum deposited by a purchaser of stock with his broker, being a certain percentage of the purchase price of the stock, the broker agreeing to advance the balance of the purchase price upon condition that he should hold the stock as security for his

advances, with the right to sell it in case of depreciation in value and failure of the purchaser to keep the margin good. This, we say, is the sense in which the word was most frequently employed, but it was also employed to describe deposits made by sellers and purchasers of stock for future delivery upon a variety of conditions, and in various ways which need not be considered here. It is enough for all the purposes of this case to say that whenever the purchaser of stock paid to the vendor of the stock, or to his broker, a percentage of the purchase price upon an agreement, that the stock should be held as security for the balance, the amount so paid was 'margin,' in the same sense in which the term was used by the framers of the constitution."

A margin is a deposit of money made by the purchaser or seller of goods, stocks and grains bought to be sold for future delivery to protect the persons from whom they buy or to whom they sell, from a loss by depreciation or increase in the value of the stocks, goods, or grain so sold.

> Memphis Brokerage Assn. v. Cullen, 79 Tenn. 95, 77.

In the parlance of the stock market, "margin" is a portion of the price of the stock or commodity purchased or sold, which the purchaser deposits with the broker as security.

> McClain v. Fleshman, 106 Fed. 880 (C. C. A.).
> Markham v. Jaudon, 49 Barb. (N. Y.) 462, 465.

In this case Forbis purchased stock of the value of $15,162.50 and paid on account thereof only $3,864.35.

This was his margin deposited with the broker as security, and enabled him to speculate in five times the amount of stock that he could have purchased by paying for it in full. This is one of the great evils of marginal business, as the speculator is frequently closed out by the market going against him, whereas, if he had purchased only such stock as he could pay for, the rapid fluctuation of the market against him would not despoil him of his entire investment. That this was a marginal transaction within the provision of the statute of Montana seems to us to be a demonstrated proposition.

Section 8416 of the Revised Codes of Montana does prohibit the purchase or sale of stock on margin, and the Forbis contract being one on margin, was illegal.

The Montana Statute which the Trustee asserts prohibits this class of contracts and makes them illegal is as follows:

Sec. 8416, Revised Codes of Montana, 1907:

"GAMBLING GAMES PROHIBITED. Any person who carries on, opens or causes to be opened, or who conducts or causes to be conducted, or operates, or runs, as principal, agent or employee, any game of monte, dondo, fan-tan, tan, stud-horse, poker, craps, seven and a half, twenty-one, faro, roulette, draw-poker, or the game commonly called round-the-table poker, or solo, or any banking or percentage game, or any game commonly known as a sure-thing game, or any game of chance played with cards, dice or any device whatever, or who runs or conducts or keeps any slot machine, or other

similar machine, or permits the same to be run or conducted, for money, checks, credits, or any representative of value, or for any property or thing whatever, *or any person or persons who conduct any brokerage business, bucket shop or office where grain stocks or securities of any kind are sold on margins*, or any person owning or in charge of any saloon, beer hall, bar room, cigar store, or other place of business, or any place where drinks are sold or served, who permits any of the games mentioned in this section to be played in or about such saloon, beer hall, bar room, cigar store, or other place of business, or permits any slot machine, or other similar machine to be kept therein, is punishable by a fine of not less than one hundred nor more than one thousand dollars, and may be imprisoned for not less than three months, nor more than one year, or by both such fine and imprisonment. (Act approved March 5, 1907, Sec. 1.) (10th Sess. Chap. 115.) Montana Penal Code."

The plain and unambiguous terms of this section of the Montana Codes absolutely point to one conclusion, and one only; the legislature of that state proposed to abolish gambling, in fact, the very heading of the section is, "Gambling Games Prohibited," then the section enumerates the games that are put on the blacklist as gambling games, and among them is selling stocks on margin. Would anyone argue for a minute if this was a poker or faro debt instead of a stock margin debt, that the money could be recovered? Most assuredly not. The legislature, in plain and certain terms by this enactment, established the law of Montana in regard to the

operation of certain games and business, and made it a penal offense to conduct a place where stock was sold on margin. The bankrupt, in defiance of that law, opened his brokerage office in Butte, Montana, where the respondent, just as much in contravention of the statute, traded with him and bought stock of Dorr, the bankrupt, on margin. The very consideration of respondent's claim is unlawful, viz., the results of his marginal deal; he could not purchase stock on margin without a violation of the law, and the law will not assist anyone to found a right upon its violation.

That the legislature of a state can prohibit the pursuit of certain occupations, if it deems them to be injurious to the public welfare and good, has been definitely decided and established in the liquor, lottery and stock wager cases. A case particularly in point on this question was taken to the Supreme Court of the United States from California. In this state we had before the Constitutional Amendment of Nov. 3rd, 1908, a provision in our constitution which made all contracts for the purchase and sale of stocks on margin void, Sec. 26, Article IV. of the Constitution of California, and said section further provided that any money paid on such contracts might be recovered in any court of competent jurisdiction.

Mr. Justice Holmes delivered the opinion of the Court, and in the decision used the following language:

"Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it

is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.' Booth v. Illinois, 184 U. S. 425, 429, 45 L. ed. 623, 626, 22 Sep. Ct. Rep. 425, 427. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the 14th Amendment became law, as indeed they were in some civilized states. See Ballock v. State, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184.

"We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might be thought a salu-

tary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price, he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin, he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster. Cashman v. Root, 89 Cal. 373, 382, 383, 12 L. R. A. 511, 26 Pac. 883. If at that time the provision of the constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in Booth v. Illinois, 184 U. S. 425, 431, 46 L. ed. 623, 627, 22 Sep. Ct. Rep. 425, we are unwilling to declare the judgment to have been wholly without foundation."

Otis v. Parker, 187 U. S. 606; 47 Law ed. 323.

The Supreme Court of the United States, in a case cited in the foregoing quotation, held that the police power of a state extends not only to the right to prohibit gambling, but also to prohibit those acts which may be used as disguises for unlawful practices, and thus have a tendency to be inimical to the public interest and welfare.

Booth v. Illinois, 184 U. S. 426, 46 L. ed. 624.

The learned Referee in Bankruptcy, in construing the foregoing Montana Statute, said:

"The Montana Statutes are, no doubt, enacted for the purpose of preventing gambling in stocks, as well as by other devices, and it is, therefore, necessary to determine whether or not this is a gambling transaction, for if it is, it is in violation of the general law of the land, as well as the Montana Statute. The same rules that will determine whether or not it is a gambling transaction under the general law will also determine whether it is a gambling transaction under the laws of the State of Montana, for it must be determined in each case what was the purpose and intent of the parties in entering into the transaction. Whether or not a transaction is a gambling transaction, can be determined in this case only by the circumstances under which it is had. In the absence of an express statute to the contrary, the general law of the land does not forbid contracts upon margin or for the future delivery of any kind of personal property." (Tr. pp. 19-20.)

Then, in the face of the fact that he is construing a statute which makes it a penal offense to conduct a place

where stocks are sold on margin, and forgetting the exception just stated by himself, "in the absence of an express statute to the contrary," decides that a marginal contract in the State of Montana is to be construed according to the general law of the land, just as if there was no law upon the statute books of Montana prohibiting this very class of contracts, such a statute being the very and only exception pointed out by himself. According to this construction, the Montana legislature meant nothing when they passed this severe penal prohibition upon such contracts. This, however, is against all recognized rules for statutory construction.

The leading case on construction of statutes of this character is Miller v. Ammon, 145 U. S. 421, and after a careful resume of the authorities, the Supreme Court said, quoting from Harris v. Runnels, 12 Howard 79, "When the statute is silent and contains nothing from which the contrary can be properly inferred, a contract in contradiction of it is void." This action (Miller v. Ammon) was brought to recover the purchase price of certain wine in the City of Chicago, sold to a resident and citizen of Wisconsin. The suit was brought in the United States Circuit Court for the Southern District of Iowa. The defendant pleaded as a defense, a municipal ordinance of the City of Chicago which imposed a license on wholesale liquor houses, which plaintiff had not complied with in securing a license at the time of the sale of the wine. A demurrer to this defense was sustained and the defendant electing to stand on such defense, judgment was taken against him and he sued

out a writ of error to the Supreme Court; Mr. Justice Brewer delivered the opinion and said, in conclusion, after reviewing the authorities, 145 U. S. p. 427:

"In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibitions; nor when we consider the subject matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act. By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative; and it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty. There is, therefore, nothing in the language of the ordinance or the subject matter of the regulations, which excepts this case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce.

"For these reasons the judgment of the Circuit Court

will be reversed, *and the case remanded, with instructions to overrule the demurrer to the answer.*"

It has been so often decided, that it has become a legal maxim, that when any matter or thing is made illegal by statute, whether by express prohibition, or by being made subject to a penalty, a contract founded directly upon such matter or thing is itself illegal and void, and further, any contract growing out of an act that is illegal, is also invalid. Examples of this are contracts for brandy manufactured and sold in violation of the revenue law; smuggled goods; a contract to dance at a theatre that has not been licensed; a check, upon which payment was stopped, given to a county agricultural society in payment of an entrance fee for a horse to compete for prizes offered by the society, in trial of speed; horse racing being made penal by statute, cannot be made the basis for an action.

When a certain class of business is allowed to operate on a license, or when it is prohibited, all contracts made in the engagement of such business, if without a license or prohibited, are illegal and void. It makes no difference to the law, if a party engages in a contract about or in connection with a forbidden act, whether he loses or gains by the transaction, it will leave him where it finds him, applying the well known and frequently used maxim, *in pari delicto.*

Pertinent illustration of the foregoing is found in the following cases:

Perkins v. Cummings, 2 Gray (Mass.) 258.

Kidder v. Blake, 45 N. H. 530.
Mudgett v. Morton, 60, Me. 260.
Kitchen v. Greenbaum, 61 Mo. 110.
Comly v. Hillegas, 94 Pa. St, 132.
Dillon v. Palmer, 46 Iowa 300.
Melchoir v. McCarty, 31 Wis. 252.
De Gegnis v. Armstead, 10 Bingham 107.
Harriman v. Northern Securities Co., 197 U. S. 245-295; 49 L. ed. 763.

One of the leading cases most frequently cited in regard to illegal contracts, is Coppel v. Hall, 7 Wallace 542, 558; Mr. Justice Swayne, delivering the decision of the Supreme Court, said:

"The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden or denounced. The maxim, *ex dolo malo non oritur actio,* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

However, in this case we are not left to construction of the Montana statute to arrive at the intentions of the Montana legislaure, for at the same time Section 8416 was enacted, the legislature added to the force of that section by providing that anyone who lost money in doing any of the prohibited things might recover the same if they followed the provisions of Section 8430, of the Revised Codes of Montana, which is as follows:

"8430. *Losses at gambling may be recovered in civil action.* If any person, by playing or betting at any of the games prohibited by this act, loses to another person any sum of money, or thing of value and pays or delivers the same, or any part thereof, to any person connected with the operation or conducting of such game, either as owner, or dealer, or operator, the person who so loses and pays or delivers may, at any time within sixty days next after the said loss and payment or delivery, sue for and recover the money or thing of value so lost and paid, or delivered, or any part thereof from any person having any interest, direct or contingent in the game, as owner, backer, or otherwise, with costs of suit, by civil action before any court of competent jurisdiction, together with exemplary damages, which in no case shall be less than fifty, nor more than five hundred dollars, and may join as defendants in said suit, all persons having any interest, direct or contingent, in such game as backers, owners, or otherwise. (Act approved March 6, 1907. 15). (10th Sess. Chap. 115.)"

Recognizing the fact that under the statute any one who engaged in the prohibited games or business as a

player or speculator was in *pari delicto* with the person who operated said game or business, the legislature of Montana provided by Sec. 8430, supra, that by filing a suit within sixty days might recover the money paid, and this is the only method by which such a claim might have been made valid. Forbis might have filed a claim for the amount of the margin he had put up with Dorr, under the Montana statute, and have had it allowed for that amount, but he elected to stand on his contract with Dorr for the purchase of stock on margin, and having done so must stand or fall with his contract and accept the consequences of his illegal act the same as Dorr would be compelled to do, if he was suing Forbis for advances and commissions while this section bars the way. The question of intent is not an issue in this case. The plain, uncompromising statute of Montana forbids recovery. Forbis is tarred with the same stick of illegality that Dorr is.

Section 8416 of the Revised Codes of Montana establishes the public policy of said State against the purchase and sale of stock on margin.

When a state enacts a statute declaring a certain occupation or business illegal, it thereby establishes its public policy in regard to such occupation or business.

The State of Montana by statutory enactment has placed the ban upon the business of a stock broker selling stocks on a margin. Engaging in such business is a crime punishable by one year's imprisonment. We do not see how the state could any more definitely indicate its policy that such business was not to exist. The legis-

lature of Montana went much further than California, where all such contracts have been held void, in regard to this form of gambling; California was satisfied in making the contracts void, but Montana said that such business should not exist and placed a penal prohibition thereon.

The public policy of a state or nation must be determined by its constitution, statutes and judicial decisions.

Vidal v. Girard's Executors, 2 Howard 127.
Swann v. Swann, 21 Fed. 299.
U. S. v. Trans-Missouri Frt. Assn., 58 Fed. 58 C. A. A.

The enactment of a statute prohibiting, regulating or licensing a business establishes the public policy of the state in regard to such business, and the constitutional provision in California, before amendment, established the public policy of this state in regard to the marginal stock cases.

Rued v. Cooper, 119 Cal. 469.

"The constitutional provision, under which the claim is made, is a declaration of public policy, and in that light the case should be considered."

A contract made in the State of Montana to buy or sell stocks on margin is against the public policy of that state and the contract upon which Forbis bases his claim is void.

A contract that binds its maker to do something opposed to the public policy of the state, or conflicts with its wants, interests, or prevailing sentiments, or our obligations to the world, or is repungant to the morals of

the time, is against public policy and void. By public policy is intended that principle which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in regard to the administration of the law. The administration of justice is maintained at the public expense; courts will never, therefore, recognize any transaction which in its object, operation, or tendency is calculated to be prejudicial to public welfare. As it has been said, "It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even the administration of commutative justice; and when they find an action founded upon a claim injurious to the public, to give no countenance or assistance *in foro civili.*" Greenwood Public Policy, p. 2.

The claim of Forbis in this case is founded upon a contract forbidden by the public policy of the State of Montana where it was made. Forbis comes into court and asks the administrators of justice to pay his claim against the estate of the bankrupt the same as those claims that are founded upon legal contracts. This will not be allowed when it can be shown, as we maintain we have shown in this case, that the claim is founded upon a contract that is prohibited by the public policy of Montana. There can be no argument upon the proposition that if Forbis was before this court with a claim for money lost or paid to Dorr under any of the other provisions of Section 8416 of the Revised Codes, that it would be considered for a moment. Why, therefore,

should his claim, because it is a purchase of stock instead of a stack of poker chips be given any different footing by the law? We maintain that such cannot be the case. The State of Montana, like many of her sister states in the West, when enacting her codes, followed and adopted many of the code provisions of California. In this state, California, the law prescribes that the consideration of all contracts must come within the provisions of Sec. 1667 of the Civil Code.

Civil Code, Sec. 1607.

Section 1667 of the Civil Code is as follows:

"1667. WHAT IS UNLAWFUL: That is not lawful which is:

"1. Contrary to an express provision of law;

"2. Contrary to the policy of express law, though not expressly prohibited; or,

"3. Otherwise contrary to good morals."

We find the identical statutory provision in Sections 5003 and 5051, Revised Codes of Montana, 1907, and in the case of Glass, et al. v. Basin & Bay State Mining Company, 77 Pac. 302 (Montana), these sections are construed and their derivation is given.

It is a well established rule of law that when a statute is adopted in the same language from another jurisdiction, that the construction, and interpretation thereof, in the courts of last resort are adopted with it and will be binding on the courts of the state adopting such statute. Therefore, the decisions of the Supreme Court of California are as much in point on these statutory provisions as that of Montana.

People v. Wilson, 117 Cal. 242.

The law of California prohibits the loaning by a public officer of the public funds. The defendant deposited certain public moneys rightly in his possession as Insurance Commissioner in the Pacific Bank. The bank failed and the Attorney General brought an action against him on behalf of the people, and recovered judgment. The defendant pleaded that he had deposited the moneys in the bank and was not responsible for the failure of the bank, or to pay the moneys deposited. The Supreme Court held that the deposit of money in the bank was "in contravention of the spirit, if not the letter also" of the subdivisions of the penal code, "and thus were unlawful (Civil Code, Sec. 1667.)"

Union Collection Company v. Buckman, 150 Cal. 160.

This action was brought upon the promissory notes payable to plaintiff's assignor. Defendant admitted the execution of the notes, but alleged they were given to one McMahon in payment of a gambling debt. The trial court so found and gave judgment for defendant. The plaintiff moved for a new trial, which was denied, then appealed. Justice Angellotti in writing the decision of the Supreme Court, said, p. 161:

"As already stated, the evidence sufficiently supports the conclusion of the trial court that the original notes were given to McMahon by defendant solely to evidence an alleged indebtedness for money lost by defendant to McMahon at a gambling game in a gambling house. At the outset, therefore, it may be stated that it is clear that under the settled law of this state the consideration

for such notes was *contra bonas mores* and unlawful (Civ. Code, Secs. 1607, 1667), and that McMahon could not have recovered thereon."

The Court then held that the assignee with knowledge stood in the shoes of the original payee and affirmed the decision of the trial court.

Kreamer v. Earl, 91 Cal. 113, 117.

This was an action by a special administrator to compel the conveyance of a parcel of ground, title to which had been procured from the state in a manner that led the Court to find was "not authorized by law," and in its decision the Court used the following language:

"It is not necessary that the act itself, or any other act, should declare in express words such a contract to be void. If, upon a review of all the state legislation upon the subject, such a contract appears to contravene the design and policy of the laws, a court of equity will not enforce it. (Civ. Code, Sec. 1667; Dial v. Hair, 18 Ala. 800; 54 Am. Dec. 179; Smith v. Johnson, 37 Ala. 636.) 'No court will lend its aid to give effect to a contract which is illegal, whether it violates the common or statute law, either expressly or by implication.' (Damrell v. Meyer, 40 Cal. 170.) The parties being *in pari delicto,* the Court will leave them where it finds them. (Waterman on Specific Performance, Sec. 207.)"

One of the early decisions which holds that certain classes of contracts are void on the grounds of public policy, is that by Lord Holt in Bartlett v. Vinor, Carthew 251, wherein he said:

"Every Contract made for or about any Matter or Thing which is prohibited and made unlawful by any statute, is a void Contract, though the Statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a Penalty implies a Prohibition, though there are no prohibitory Words in the Statute."

Dillon & Palmer v. Allen, 46 Iowa 300.

"I. At the time the contract sued upon was entered into and performed by plaintiff, the following statute of this state was in force:

" 'If any person run any threshing machine in this state, without having the two lengths of tumbling rods next the machine, together with the knuckles or joints and jacks of the tumbling rods safely boxed and secured while the machine is running, he shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than ten or more than fifty dollars for every day or part of a day he shall violate this section; and an action may be maintained for services rendered by or with any such threshing machine, for the benefit of the school fund.' Code, Sec. 4064. This provision was amended by Chap. 38, Acts Fifteenth General Assembly, as follows:

"Section 1. That Section 4064, of Chapter II., Title 24 of the Code, be amended by striking out all the part of said section after the word 'Section' in the seventh line, and inserting in lieu thereof the following: And any person who shall knowingly permit either his own grain or any that may be in his possession or under his control to be threshed by a machine, the rods, knuckles or joints

of which are not boxed in accordance with the requirements of this section, shall be liable to like fine as that prescribed for the person running such a machine, both of which fines may be recovered in an action brought before any court of competent jurisdiction.

"II. We are required to determine whether, under this statute, the answer of defendant, assailed by the demurrer, presented a sufficient defense to the action. We think it a settled doctrine of the common law, that contracts intended to promote, or requiring the performance of acts forbidden by statute are void, and this is so, though the statute does not so declare, but only inflicts a penalty for its violation upon the parties forbidden to do the acts. See Chitty's Contracts, 694-7, and authorities cited in notes. Guenther v. Dewein, 11 Iowa 133; Pike v. King, 16 Iowa 49.

"III. We do not understand that counsel for plaintiffs question the correctness of this rule, as it is generally expressed, but claim that this case is within certain admitted exceptions to its operation. They argue, in the first place, that the parties were *in pari delicto*, and, therefore, if defendant be protected from his contract, he will thus be permitted to take advantage of his own wrong. While the principle upon which this position is based is the substance of a maxim of the law, yet it is the subject of exceptions and modifications by the application of other doctrines and rules, which may truly be said of almost all rules of law. The effects of statutes which make unlawful specified acts, upon persons violating them or aiding in their violation, are not con-

sidered in their enforcement by the courts. If one offender suffers thereby and the other gains an apparent benefit, no argument can be drawn therefrom for suspending the operation of the law. This is an incident in the administration of justice against which neither legislatures nor courts can provide. The party suffering, being *in delicto,* cannot complain of the operation of the law, for he merits the punishment prescribed for its violation. It cannot be said that the law confers upon the other a benefit because of his violation of its provisions. What he gains comes to him as a punishment of the other party, not as a reward to himself. In like cases, as where contracts are made upon Sunday, both parties violating prohibitions of the statute, the law is enforced, even though one of the guilty parties may be exempted from a liability that would otherwise exist against him. It often happens that a defendant may avoid his contract in an action thereon by alleging his joint wrong and criminality with the other party in violating a statute by entering into the contract. Wheeler v. Russel, 17 Mass. 258; 2nd Chit. Cont. (Russell's Ed., 11th Am.) 975."

In the following case from Missouri, the Court held the contract void because the consideration was illegal, for the reason that it was in direct contravention of the statute law of the state as well as the public policy, and in its decision the Court gives a clear statement of the law of public policy and cites many cases bearing on the question at issue here.

Kitchen v. Greenabaum, et al., 61 Mo. 110.

This was an action brought to recover $600.00 alleged to have been fraudently obtained from plaintiff by defendants. Plaintiff attempted to state in his petition a cause of action for fraud in that defendants has secured from him by fraud a lottery ticket that had drawn a prize of $600.00. The defendants filed a general demurrer on the ground that the petition alleged an illegal transaction, to-wit, the sale of a lottery ticket, which sale is prohibited by the law of Missouri. The trial court sustained the demurrer and the plaintiff appealed to the Supreme Court.

Judge Sherwood, in delivering the opinion of the Court, said:

"The Constitution of this State prohibits the legislature from authorizing any lottery, and forbids the allowance of the sale of lottery tickets (Sec. 28, Art. 4, Const. of Mo.). Sec. 28, Art. 8, Wagn. Stat., p. 563, vol. 1, is as follows: 'Any person who shall sell or expose to sale, or cause to be sold or exposed to sale, or shall keep on hand for the purposes of sale, or shall advertise or cause to be advertised for sale, or shall aid or assist, or be in anywise concerned in the sale or exposure to sale, of any lottery ticket or tickets, or any share or part of any lottery ticket in any lottery, or device in the nature of a lottery, within this state, or elsewhere, and any person who shall advertise or cause to be advertised, the drawing of any scheme in any lottery, and shall be convicted thereof in any court of competent jurisdiction shall for each and every such offense forfeit and pay the sum not exceeding one thousand dollars.'

"The petition in this case clearly discloses that the ticket in question falls within the purview of the above statutory provision, and the sale, therefore, was in violation of the law. No importance is to be attached to the fact that the ticket, prior to its sale, had drawn a prize, the statute under consideration being sufficiently comprehensive to embrace sales made subsequently as well as anterior to the drawing. Otherwise the beneficient purposes of the statute might be very readily evaded, by simply making sale of the tickets after the drawing, but before the discovery of the winning numbers. It will be observed that the statute referred to levels its denunciations and penalties, not only against those who sell lottery tickets, but against 'any person who shall * * * be in anywise concerned in the sale or exposure to sale.' It follows from this that the defendants as well as the plaintiff are guilty of violating the law. And the rule which generally prevails when either party to the illegal contract or transaction applies to the courts for aid, had been correctly stated by counsel for defendants."

The Montana law of public policy especially follows that of California, as they have adopted in exact language the statute of our state, in defining illegal considerations of contract. Sec. 5501 of the Revised Codes of Montana, 1907, being the duplicate of Section 1667 of the Civil Code of California. The many California cases which hold that a void contract cannot form the basis of a judicial decision, are as good authority in this court in determining the validity of a Montana contract as the decisions of the Supreme Court of Montana.

The following California cases are a few of the many decisions by our own Supreme Court to the effect that a contract entered into for an illegal consideration will not be enforced by a court of justice, but the parties will be left where their own acts have placed them:

Santa Clara Lumber Co. v. Hays, 76 Cal. 387.
Gardner v. Tatum, 81 Cal. 373.
Jones v. Hanna, 81 Cal. 509.
Estate of Croome, 95 Cal. 69.
Buck v. City of Eureka, 109 Cal. 504.
Chateau v. Singla, 114 Cal. 94.
DeLeonis v. Walsh, 140 Cal. 175.

The leading case in Montana is one in which the question of the illegal consideration of the contract therein in question was very carefully considered by the Supreme Court and after an exammination of the authorities from many states, and notably those of California, the Court enunciated those principles of law contended by the Trustee to be applicable to the contract upon which Forbis bases his claim in this matter. Glass et al. v. Basin & Bay State Mining Company, 77 Pac. 302 (Mont.).

Plaintiffs being owners of 1425 shares of the capital stock of the defendant corporation at the request of defendant, deposited 1400 shares thereof with defendant to be sold to pay debts and current liabilities of defendant, and in consideration for such stock plaintiff James Glass should have the offices of Vice-President, Trustee and General Manager of defendant corporation, and Plaintiff Alexander J. Glass should have the office of

Trustee and Treasurer of defendant corporation until the business of defendant should be in successful operation; that there was no other consideration for said stock; that business of defendant has never been in successful or any other operation; that defendant in violation of its agreement, ejected plaintiffs from said offices, and the consideration for said stock thereby failed and plaintiffs prayed for recovery of stock or value thereof. Judgment went for defendant and plaintiffs appealed to the Supreme Court. The decision on appeal is in part as follows:

"Having determined that the complaint neither states a cause of action in claim and delivery nor in conversion, we will look to it to see whether plaintiffs may recover upon the contract. The plaintiffs concede the contract to be void, but do not indicate upon what ground they make such concession. In examining the subject, we find that Section 431 of the Civil Code provides that the directors of a corporation must be elected annually by the stockholders or members. By the contract pleaded it was agreed that the plaintiffs should be trustees (directors) until the business of the defendant should be in a successful operation. Over four years elapsed, and yet it is alleged 'that the business of the defendant has never yet been in successful or other operation.' Section 2240 of the Civil Code reads: 'That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals.'

"It thus appears that this contract is void and unlaw-

ful, as being directly contrary to an express provision of law, in so far as it provides for the plaintiffs to succeed themselves as trustees indefinitely; and, in so far as it provides that the plaintiffs shall have a like tenure of the offices of general manager and treasurer of the corporation, it is within the inhibition of the second and third provisions of Section 2240. Similar contracts have frequently been declared void as against public policy. (Cases cited). In Swanger v. Mayberry, 59 Cal. 91, the Court said:

" 'The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void.' This rule applies to every contract which is founded on a transaction malum in se, or which is prohibited by statute, on the ground of public policy. (Cases cited). In Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880, the Court quoted the foregoing language from Swanger v. Mayberry, and continued: 'This principle is in accord with the express provision of our Civil Code, which makes that unlawful which is either contrary to the express provision of law, or contrary to the policy of express law, though not expressly prohibited. Civ. Code, Sec. 1667.' See note to Parsons v. Trask, 66 Am. Dec. 506. Section 1667, referred to, is identical with Section 2240, supra. And see Sections 2150, 2151, 2153, 2162, 2163, Civ. Code.

"The complaint contains no suggestion that the plaintiffs have repudiated the contract, nor any facts upon

which a repudiation thereof by them may be deduced. On the contrary, they allege that their side of the contract has been fully executed, but that the defendant ousted and ejected them from the offices they held and were to hold by virtue of the contract, and refused and still refuses to permit them to hold and enjoy the same. They characterize these acts of defendant as being in violation of the contract and as wrongful. The following language from the opinion in Williamson v. C. R. I. & P. R. Co., 53 Iowa, 126 4 N. W. 870, 36 Am. Rep. 206, is pertinent here: 'In this case the plaintiffs have fully performed the contract on their part. On their side the contract has been executed. The action is not brought in disaffirmance of their contract. Upon the contrary, they allege a full performance of the contract upon their part, and a breach of the contract upon the part of the defendant. It is upon this breach that they predicate their right to recover. Their action is upon the contract. * * * We felt fully satisfied that for a breach of contract, as alleged and proven, no damages are recoverable.' The facts in the case from which we have just quoted were that the plaintiffs procured the conveyance to the defendant of certain lots in the city of Des Moines upon consideration of a promise by defendant that it would build thereon passenger and freight depots, which should be the only ones built or maintained by it in said city. Defendant built and maintained both passenger and freight depots thereon, but, having also built a depot in another part of the city, an action was brought by the plaintiffs to recover, as damages, the value of the lots conveyed. It

was held that such action was based upon the contract, which was illegal, and void as against public policy, and, the parties in making and carrying out the contract which seems to have been fully executed by plaintiffs, and performed by defendant for over four years, were equally at fault. Therefore, the maxim that, 'As between those in equal fault, the possessor's case is the better,' applies in all its force. (Cases cited). No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxim, *'Ex dolo malo non oritur actio,'* and, *'In pari delicto, potior est conditio defendentis.'* The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore, neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside as the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. It is unnecessary to cite authorities in support of this text. 'Their name is legion.' "

If a person can transact business prohibited by severe penal statutes such as Sec. 8416, and not conflict with the public policy of the state, we do not think that there can be any such thing as public policy. The authorities are all agreed that any contract which violates *expressly,* or by *implication,* any statute, is illegal, and it

has been repeatedly said in the Courts that they will not recognize any contract which in its *object, operation* or *tendency* is apt to be prejudicial to the public welfare.

The case of Glass v. Basin, etc., Mining Company, supra, is a clear and unequivocal construction of the Supreme Court of the State of Montana of Sec. 5051 of the Revised Codes, wherein it is said, "That is not lawfut which is contrary to the policy of the express law, though not expressly prohibited. And our own Supreme Court (California) quoted in that decision said:

"The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void."

This language clearly covers the facts as to the Forbis claim.

The Rules of Public Policy of the different states are binding upon the Federal Courts.

The Federal Courts are just as much bound by the rules of decision, to follow the established public policy of a state on contractual relations arising within the state as they are to follow the construction of the statute of a state given by the highest court of the state. When the policy of the state is manifest, the courts of the United States are bound to notice it as a part of its code of laws and to declare all contracts within the state repugnant to it to be illegal and void.

Bank of Augusta v. Earle, 13 Peters 519.

M. K. & T. Trust Co. v. Krunseig, 172 U. S. 35.

The fact that Dorr disposed of the stock purchased by Forbis on margin without orders from Forbis does not allow Forbis to recover on his illegal contract.

This is really the pivotal question in this case, as counsel for respondent have never seriously argued that the contract itself was not illegal in the face of the penal statutes of Montana, but, because Dorr did not have this stock on hand at the date of the bankruptcy, claim that Forbis is exempted from the effect of his illegal contract. Conceding that this contract is illegal, how then can Forbis avoid the consequences of his illegal act and contract? He had his plain remedy given him by Sec. 8430 of the Revised Codes of Montana, but he was not satisfied with the money he had parted with as the consequences of his illegal contract, he wanted the benefit of his illegal act, and filed a claim against the estate of the bankrupt under his contract and transaction with Dorr. His claim is upon an open brokerage account which shows upon its face from the copy of the account attached to his claim by respondent that it is for the value of 400 shares of Steel Common upon which he was indebted to Dorr in the sum of $11,298.15 and that respondent has never had the stock delivered to him, and it was therefore a marginal account and transaction. Respondent in this claim sets up his very contract with Dorr, and it was necessary for him to prove it before his claim could be allowed, namely, that on a certain date he purchased so many shares of stock from Dorr on a margin in Butte, Montana, where Dorr conducted a brokerage office where stocks were sold on

margin. The account shows on its face that it was a marginal transaction. The word "long" in the parlance of stock brokers means a purchase of stock on margin, not to be delivered at the time of the purchase. In other words, for " future delivery." If the accounts had been closed Forbis would not have been "long 400 Steel Common." (Tr. p. 6.)

"Longs" (or long) is a term used in the language of the Boards of Trade, stock exchanges, etc., to designate the buyers of commodities and stocks for future delivery, who by reason of the fact that there is a much greater quantity of such commodities sold for future delivery than can be purchased in the market are said to have procured a corner and by insisting upon delivery can run the prices up to a fictitious point.

Cyc. Vol. 26, p. 1603.

Forbis having alleged and proven his illegal contract with the bankrupt cannot recover thereon.

The line of demarkation between those illegal contracts upon which recovery may be had, and those where relief is denied is one that has received many and various constructions by the different Federal and State Courts in this country. This is especially so when the defense of illegality is based solely upon the grounds of public policy. In this case we maintain that the contract upon which respondent seeks to recover is illegal not only because it is against the public policy of Montana, but also that it is prohibited by the *plain penal statutory mandate* of that state. The deciding point as to whether the proceeds or consideration of an illegal contract can

be recovered or not is, has the person so seeking to recover disclosed his engagement in or about the forbidden act or illegal matter? If this has been done, then he cannot recover. This Forbis has done both in his verified proof of claim and in the stipulated facts.

The best illustration of this proposition and one that appears to us to be conclusive in the decision of this petition for review in favor of the petitioner is the case of Hoffman v. McMullen, a decision of this Court upon an appeal from Circuit Court of the Ninth Circuit, District of Oregon; the opinion is by Hawley, District Judge, and after an exhaustive review of the many authorities upon this question, said:

"The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had, of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but, when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction and the title or right of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he may recover."

Hoffman v. McMullen, 83 Fed. 372, 384.

The plaintiff took the case to the Supreme Court of the United States on a writ of certiorari, and there the judgment of the Circuit Court of Appeals for the Ninth Circuit was affirmed. The decision of the Supreme Court was delivered by Mr. Justice Peckham, and in reviewing the law on the question of the illegality of the contract upon which the action was founded, and in illustrating that wherever the plaintiff was a party or privy to the illegal contract or transaction, he was not entitled to recover any advance made by him in connection with or profits derived from such contract, said:

"Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal. Booth v. Hodgson, 6 T. R. 405, 408; Thomson, 7 Ves. Jr. 470; Embrey v. Jemison, 131 U. S. 336, 348 (33: 172, 177).

"In the first of the above cases the plaintiff sought to maintain his action by referring to that part of the contract which was not illegal, and to ask a recovery upon that alone. Lord Kenyon, Chief Justice, observed that it seemed to be admitted by counsel for plaintiff 'that if the whole case were disclosed to the Court there was no foundation for the demand.' They say to the court, 'suffer us to garble the case, to suppress such parts of

the transaction as we please, and to impose that mutilated state of it on the Court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him.

"Mr. Justice Ashhurst, in the same case, said: 'The plaintiffs wish us to decide this case on a partial statement of the facts, thereby admitting that if the whole case be disclosed, they have no prospect of success; but we must take the whole case together, and upon that the plaintiffs cannot recover.'

"Mr. Justice Grose said: 'We cannot decide on a part of the case; and taking the whole together, and assumpsit cannot be raised from one part of the case when the other parts of it negative an assumpsit.' The defendant therefore had judgment.

"In Thomson v. Thomson, supra, the plaintiff was not permitted to recover, because he had no claim to the money except through the medium of an illegal agreement. The master of the rolls (Sir William Grant) said: 'If the case could have been brought to this, that the company had paid this into the heads of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection (the illegality of the contract) as a reason for not performing his trust. Tenant v. Elliott is, I think, an authority for that. But in this instance it is paid to

the party; for there can be no difference as to the payment to his agent. Then how are you to get at it, except through this agreement. There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the Court to enforce it. I must therefore dismiss the bill.'

"And in Embrey v. Jemison, supra, although the action was upon four negotiable notes, the Court would not permit a recovery to be had upon them, because the consideration for the notes was based upon a contract which was illegal. Mr. Justice Harlan, in delivering the opinion of the Court, said, 'that the plaintiff could not be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected with, a wagering contract.

" 'They must therefore be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law,' citing Coppell v. Hall, 7 Wall. 542, 558 (19:244, 248).

"In the latter case Mr. Justice Swayne, delivering the opinion of the Court, said: 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.'

"These authorities uphold the principle that the whole case may be shown, and the plaintiff cannot prevent it by proving only so much as might sustain his cause of action, and then objecting that the defendant himself brings in the balance which was not necessary for plaintiff to prove.

"The cases above cited as illustrative of the exceptions to the general rule also show what is meant by the cause of action, being founded on some new consideration, or upon a contract collateral to the original illegal one."

The rule in regard to the denial of relief under illegal

contracts was applied in Cumberland Tel. & Tel. Co. v. City of Evansville, 127 Fed. 188, 196. This was a bill filed by the Telephone Company to enjoin the city from interfering with the company's use of the city streets for telephone purposes. The plaintiff company had acquired its alleged right to use the streets through an assignment to it of certain franchises and the entire business of the Evansville Telephone Company to which the City of Evansville had made certain grants in 1882, which it attempted to transfer to the plaintiff company in 1885. The city alleged that the sale by the Evansville Company to the plaintiff company of all its rights, franchises and property was void, ultra vires and against public policy. The case was decided by Anderson District Judge in favor of the city, and a petition for rehearing was filed, and in denying the petition for a rehearing, the Court said:

"Complainant is in this position. It claims title by virtue of a contract which is absolutely void because in violation of positive law, and it asks this Court to recognize and protect a title thus acquired. 'No court of justice can, in its nature, be made the handmaid of iniquity.' U. S. Bank v. Owens, 2 Pet. 538, 7 L. Ed. 508. Lord Mansfield, in Holman v. Johnson, Cowp. 341, stated the ground on which courts proceed in such cases as follows:

" 'The principle of public policy is this: *"Ex dolo malo non oritur actio."* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi

causa, or the transgression of a positive law of this coutry, then the Court says he has no right to be assisted, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'

"In Gibbs v. Baltimore Gas Co., 130 U. S. 396, 410, 9 Sup. Ct. 553, 32 L. Ed. 979, the Court quotes from Bishop on Contracts:

" 'The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law.'

"In Pullman's Car Co. v. Transportation Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108, after citing with approval the case of Holman v. Johnson, 1 Cowp. 341, and many other cases, the Court said:

" 'They are substantially unanimous in expressing the view that in no way and through no channels directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of the courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not, in such endeavor, permit any recovery which will weaken the rule founded upon the principles of public policy already noticed.' How can complainant claim the protection of this Court for its al-

leged title to this easement without having recourse to the contract by which it claims to have acquired that title? To grant the relief sought by complainant is to both recognize and enforce a contract which the law declares to be absolutely void; void because of want of power to make it, and void because contrary to public policy. * * * But it is the duty of courts to refuse recognition to an illegal contract whenever and however its illegality appears. A court is, in the due administration of justice, bound to refuse its aid to enforce an illegal contract, even if its invalidity be not pleaded. Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539. A party to the contract cannot waive its invalidity."

In Pittsburg D. & C. Co. v. Monongahela & W. D. Co., 139 Fed. 780, a case decided in the Circuit Court of the Western District of Pennsylvania, the Court said:

"The plaintiff, then, being driven to the necessity of showing such a contract as the foundation of its right to recover, will the law lend its aid to enforce such an agreement? The answer to this turns on the question whether this is an illegal contract, for, as Lord Kenyon said, 'It is a maxim in our law that a plaintiff must show he stands on fair ground when he calls a court of justice to administer relief to him,' and to the same effect is the holding of the Supreme Court in McMullen v. Hoffman, 174 U. S. 639, namely: 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is

brought in which it is necessary to prove the illegal contract in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged right directly springing from such contract.' It will be observed that when the law refuses to be used to enforce an unlawful contract, it is not done to benefit or aid the party who has profited by the wrong, and who is in possession of the fruits of the fraud, but on the higher ground of public policy. This may result in a wrongdoer profiting by his own wrong, but to transfer the money to the other wrongdoer would equally enable that other to profit by his unlawful act. But assuredly the party who is thus left remediless cannot justly complain, for if, for the purposes of legal relief, the parties are without remedy, they have outlawed themselves, and the law wisely holds aloof, and leaves without its aid those whose deliberate purpose was to transgress its provisions. Nor is it necessary that the objectionable contract actually perpetrate a fraud, or that any wrong should have been done to any one. It is the nature and object of the contract, apart from the fact, whether wrong actually from it results, that bars its enforcement.

" 'The law looks to the general tendency of such contracts. The vice is in the nature of the contract, and it is condemned as belonging to a class which the law will not tolerate. * * * The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement.' McMullen v. Hoffman, supra.

"The contention is that this contract upon which the

action is brought is merely collateral to any contract between the plaintiff and the other members of the illegal combination. But if the contract to pay for the goods included in the account sued upon is only part of an entire agreement, which included stipulations that are illegal, this case of the plaintiff must fail. It is elementary law that the courts will not lend assistance in any way in carrying out an illegal agreement. (Citing cases). Nor can a plaintiff show such part of an entire agreement as is legal and sue upon that alone. The whole must come."

Continental Wall Paper Co. v. Voight, 148 Fed. 939-940.

This case was taken to the Supreme Court on certiorari and Mr. Justice Harlan delivered the opinion of the Court and affirming the judgment of the Circuit Court of Appeals, said:

"The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly Case. In that case the Court regarded

the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral independent contract, can escape an obligation to pay for them upon the ground merely that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching the question was decided or intended to be decided in the Connolly Case. The question here is whether the plaintiff company can have judgment upon account which it is admitted by demurrer, was made up, with the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interests must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

"In Hanauer v. Doane, 12 Wall 342, 349, 20 L. ed. 439, 441, this Court said: 'The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.

"Contienntal Wall Paper Co. v. Voight, 212 U. S. 261."

The following cases are in point and illustrate the legal principle contended for by the trustee in this action, and in every one of them the case of McMullen v. Hoffman, supra, is cited as the leading case on the proposition that the courts will not uphold a contract, or permit any recovery thereon, by any person who is a party or privy to the contract or transaction, or permit such party or privy to recover any advances on or profits from such illegal contract or transaction.

Pittsburg Con. Co. v. West Side B. R. R., 151 Fed. 128 C. C.

Pittsburg Con. Co. West Side B. R. R., 154 Fed. 929 C. C. A.

Cobb v. Crittenden, 151 Fed. 510.

Mackin v. Shannon, 165 Fed. 100.

The learned District Judge in affirming the judgment of the referee, based his decision solely upon the case of Planters' Bank v. Union Bank, 16 Wallace 483. This was an action by the Planters' Bank of Tennessee at Natchez against the Union Bank of Louisiana at New Orleans. The facts were as follows: On the outbreak of the war in 1861, the states of Tennessee and Louisiana both seceded, and while both states were in control of the Confederate States the Planters' Bank sent to the Union Bank at New Orleans sums of Confederate treasury notes, drafts and other claims for collection, and a few Confederate bonds for sale, it being agreed between the two banks that the drafts and claims forwarded for collection and the price of the bonds sent for sale were payable only in Confederate currency. In this way a large balance was made up in favor of the Planters' Bank, and suit was brought thereon, in the United States Circuit Court, District of Louisiana, after the close of the war. Two of the questions that arose in the case were as follows: First: Is a promise to pay in Confederate notes in consideration of the receipt of such notes, an illegal contract? Upon the authority of Thorington v. Smith, 8 Wallace 13, the Court held that such promise was not founded upon an illegal consideration, and was

not an illegal contract. The second question was as to the right to recover the proceeds of the sale of certain Confederate bonds, and we qoute the entire decision upon that point:

"Nor should the Court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction had been consummated, when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the

transaction to discover its origin. Thus, in *Faikney* v. *Reynous* (4 Burrow 2096), a plaintiff was allowed to recover in an action on a bond given by a partner to his copartner for differences paid in a stock jobbing transaction prohibited by act of Parliament. This was the case of an express agreement to pay a debt which could not have been recovered of the firm. *Petrie* v. *Hannay* (3 Term 419), was a similar case, except that the partner plaintiff had paid the differences by a bill on which there had been a recovery against him, and his action against his copartner for contribution was sustained. This was an action on an implied promise. *Ex parte Bulmer* (13 Vesey 316), goes much farther, and perhaps farther than can now be sustained. We are aware that *Faikney* v. *Reynous* and *Petrie* v. *Hannay* have been doubted, if not overruled in England, but the doctrine they assert has been approved by this court (Armstrong v. Toler, 11 Wheaton 258; McBlair v. Gibbs, 17 Howard 236; Brooks v. Martin, 2 Wallace 70.) *Lestapies* v. *Ingraham* is full to the same effect. We think, therefore, the court was not in error in refusing to affirm the defendants' points."

In the first place, the transactions in Confederate currency were not unlawful, and by the same reasoning the transactions in Confederate bonds would not be unlawful. The purchase and sale of bonds of the Confederate States could not be either more or less unlawful than the purchase and sale of their promise to pay called currency. Both bonds and currency were promises payable only after a successful termination of the conflict the

Confederate government was then waging, and were both issued by the Confederate government for the same purpose and effect. We cannot discover that any different law should apply as between the two. On the other hand, the authorities upon which the Planters' Bank case was decided are not at all in line with the case at bar.

In the cases last mentioned above, and upon which the court based its decision, the actions were not brought on the illegal contract or transaction, or to recover any proceeds of such. *Armstrong* v. *Toler,* 11 Wheaton 258, was an action brought by Toler against Armstrong to recover his proportion of a sum of money paid by him on account of the appraised price of certain goods consigned to Toler which had been imported contrary to law. When the goods were libeled, Armstrong agreed that if the goods were condemned, Toler was to pay their appraised value, and Armstrong would reimburse him for his share therefor. Toler, upon this consideration, paid the appraised value. Armstrong's portion of the consignment having been delivered to him, he refused to pay his proportion of the amount paid to the government, as he had agreed to do. Toler sued him, and the Court held that it was an enitrely new and legal contract, and said:

"It cannot be questioned that, however strongly the laws may denounce the crime of importing goods from the enemy in time of war, the act of defending a prosecution instituted in consequence of such illegal importation is perfectly lawful. Money advanced then by a friend in such a case, is advanced for a lawful purpose,

and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration."

McBlair v. *Gibbs,* 17 Howard 232, was an action by the executor of the estate of one Oliver to recover a portion of a certain fund resulting from a claim against the Mexican Republic, allowed under the convention of 1839. This fund was in the possession of McBlair as administrator, and the estate of Oliver had acquired its right thereto by assignment from one Goodwin, who had been a party to the original contract between General Mina, representing the embryotic Mexican Republic, and was, in fact, for furnishing arms and supplies for a filibustering expedition against Spain, the kingdom to which Mexico at that time belonged. The assignment was for a valid and legal consideration, and the Court in its decision, said:

"It is urged * * * that the contract with General Mina being illegal, the sale and assignment of it from Goodwin to Oliver must also be illegal, and consequently that no interest therein, equitable or legal, passed to Oliver's executors.

"But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegailty. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract

was founded. Oliver was not a party to these transactions, nor in any way connected with them.

"It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making or in the fulfillment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defense, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfillment depended altogether upon the voluntary act of Mina, or of those representing him.

"No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it."

Brooks v. *Martin,* 2 Wallace 70, and also *Planters' Bank* v. *Union Bank,* supra, are both stated and distinguished in McMullen v. Hoffman, supra. Both were cases barely outside of the line where a defense on the grounds of illegality would be allowed, and we maintain are not parallel cases with the one at bar, for the reason

that in this case the respondent was compelled to and does set up his illegal contract or transaction as the basis for his recovery, and in both of which cases the Supreme Court was divided as to the decision, and dissenting opinions were filed.

In all those cases, including the Planters' Bank case, a recovery was allowed upon a new and different contract, but here Forbis has set up his illegal contract or transaction and predicates his recovery thereon. In fact, this he is compelled to do by the Bankruptcy Act itself before he would have a legal claim.

"*PROOF AND ALLOWANCE OF CLAIMS.*—a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and if so, what securities are held therefor, and whatever any, and if so what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The Bankruptcy Act of 1898, Sec. 57, a.

The respondent Forbis is compelled to set up the consideration of his claim and thereby discloses the illegality of the transaction upon which it is based, thus bringing this case clearly within the rule laid down in the leading case of *McMullen* v. *Hoffman* (supra), in which it was said: "The difference in the principle upon which a recovery was allowed in these two cases (referring to Tennant v. Elliott, 1 Bos. & P 2, decided in 1797, and Farmer v. Russell, 1 Bos. & P 296, decided in 1798, the latter being one of the cases upon which the Planters'

Bank case was decided), and that upon which the defense in this case is based is very clear. In the case before us, the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal."

In every case in which a recovery has been had in this class of cases, it has been when there was no necessity of pleading or proving the illegal transaction upon which the demand originally arose, but here, the exact opposite is the case; the respondent in his claim (Tr. p. 6) sets up his marginal transaction prohibited by the Montana Statutes. The stipulated facts (Tr. p. 11-13) clearly bring the contract or transaction between Dorr, the bankrupt, and respondent, within the class prohibited.

We, therefore, respectfully submit that this case is one of those definitely defined in *McMullen* v. *Hoffman,* 83 Fed. 372; 174 U. S. 639, in which no recovery can be had, and the petition of the Trustee for review should be granted.

HICKCOX & CRENSHAW,
Attorneys for Petitioner.

No. 1873

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In re FRED DORR,
a Bankrupt,

CARROLL ALLEN, Trustee,
Petitioner,

vs.

JOHN J. FORBIS,
Respondent.

PETITIONER'S REPLY BRIEF.

HICKCOX & CRENSHAW,
Attorneys for Petitioner.

The Neuner Co., Los Angeles, Cal.

No. 1873

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In re FRED DORR,
a Bankrupt.

CARROLL ALLEN, Trustee,
Petitioner,
vs.
JOHN J. FORBIS,
Respondent.

PETITIONER'S REPLY BRIEF.

By permission of the Court, petitioner presents herein, certain points and authorities and replies to those advanced and cited by respondent in his brief and on argument at the time the petition for review was heard.

We first call the Court's attention to the rule of law contended for by respondent in his argument, to-wit, that the rules of public policy of the

various states, as declared by their constitutions, statutes and decisions of courts of last resort, will not be followed by the Federal Courts. Respondent cites and quotes from certain cases to support his position, but not one of the cases cited goes as far as the rule laid down by him, and in all the cases cited the state statutes and usages are made an exception. In the case of *Hartford Fire Insurance Co. v. R. R. Co., 70 Fed. 201,* quoted on page 15 of respondent's brief, a decision of the Circuit Court of Appeals, Eighth Circuit, the decision was written by Circuit Judge Sanborn, but was not a unanimous decision of the Court. Circuit Judge Caldwell wrote a strong dissenting opinion, and in *M. K. & T. Trust Co. v. Krumseig, 77 Fed. 30,* the same legal proposition was again before the Court, and the decision of the Court was delivered by Judge Caldwell, with Judge Sanborn dissenting. This case was taken to the United States Supreme Court and the decision of the Circuit Court of Appeals affirmed, and the rule of law given by Judge Caldwell in his dissenting opinion in *Hartford Fire Insurance Co. v. R. R. Co., 70 Fed. 201,* and his decision in the case on appeal, were affirmed. The following is a short quotation from the decision of the Supreme Court, *M. K. & K. Co. v. Krumseig, 172 U. S. 351 @ 357:*

"But it is strenuously agrued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the states or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case, that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask.

"We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the state. It seems to be conceded, or, if not conceded, it is plainly evident, that if the cause had remained in the state court where it was originally brought, the complainant would have been entitled, under the public policy of the State of Minnesota, manifested by its statutes as construed by its courts, to have this usurious contract conceled and surrendered without tendering payment of the whole or any part of the original indebtedness. The defendant company could not, by removing the case to the Federal court, on the ground that it was a citizen of another state, deprive the complainants of such a substantive right. With the policy of the state legislation the Federal

> courts have nothing to do. If the states, whether New York, Arkansas, Minnesota, or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified, and canceled by the courts, such a view of public policy, in respect to contracts made within the state and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the state, furnishes the rule of decision."

This same rule applies in cases in bankruptcy, and the Federal courts will construe the contract or transaction according to the state law.

Hewitt v. Berlin Machine Works, 194 U. S. 296;

In re Heckathorn, 144 Fed. 499.

The question as to the illegality of the contract and transaction in this case is to be determined by the law of Montana.

The Trustee does not dispute that under the law of the State of New York, marginal transactions may be valid and legal. However, even under the law of New York, which is the common law, because, as stated by counsel for Respondent in his brief, the only statute in force in New York restricting marginal sales, was repealed in 1857 (Respondent's Brief, p. 16), the question as

to the illegality of a marginal claim in the State of New York will be determined solely upon the question as to whether the parties thereto actually intended to complete their transaction by the delivery of and payment for stock purchased, or whether it was only to be settled on differences, so that under the law of New York all marginal sales are not legal, and, as in the majority of the states, it is a question of intention of the parties, the burden of proof being, of course, upon the party asserting the illegality of the transaction. In this case we have an entirely different law to apply to a given state of facts.

It is stipulated that Dorr was conducting a brokerage business in Butte, Montana, where grain stocks and other securities were sold on margin, and that the respondent in such office, bought stock on margin. This, we maintain, brings the contract and transaction clearly within the statutory provision of the State of Montana. The statute does not inquire into or make the intention of the parties any criterion as to whether the matter is prohibited or not. It makes it a penal offense to conduct such business, and any person who engages in transactions in the conduct of the forbidden business, places himself *in pari delicto* with the person conducting the business.

Not in a single case cited by counsel for Respondent in his brief asking for the application of the New York rule, was there a statute that prohibited the occupation from being engaged in the state where the person who purchased the stock or grain on margin performed his portion of the contract and transaction. The only case that would seem to be at all in point with the proposition advanced by the Respondent, is the case of *Ward v. Vosburg, 31 Fed. 20.* In this case all the transactions were had in the City of Chicago, the place where all contracts were made and where all the contracts were executed; but because the defendant lived in the state of Wisconsin, where the plaintiff broker was compelled to sue him in order to secure jurisdiction, he attempted to set up the statute of Wisconsin in regard to marginal transactions as a bar to the claim, and the Court would not permit this for the reason that the evidence undisputed showed that the defendant Vosburg lived not very remote from Chicago; was frequently in that city, and had for considerable time been accustomed to transact business on the Board of Trade; that he sold butter and cheese on the Board of Trade at Elgin, Illinois, and visited the Board of Trade in Chicago with the plaintiff, and that he was in constant communication with the plaintiff, *and*

gave the orders for his purchases and sales by letter and telegram. This is an entirely different state of facts from the one in this case. If Dorr had not had an office in the City of New York, and the purchase made by the Respondent had been made by orders given by telegram and letter from Respondent in Butte to Dorr in New York, then, possibly, Respondent would be in a position to have the New York law applied, but where both the bankrupt Dorr and the Respondent were engaged in transacting a business prohibited by the Penal Statute of the state, then it would seem that such contracts and transactions entered into between them in the transaction of the prohibited business would be absolutely illegal and void, and neither party could recover any money advanced or profits arising from such prohibited transaction, and surely not where the person seeking to recover is compelled, as the Respondent has been in this case, to plead and prove his connection with the prohibited business.

In all cases cited in Respondent's brief on this point, not a single one was decided upon a statute prohibiting the business of selling stocks on margin. In every case the question of intention of the parties as to whether the contract or transaction was a wagering one or not, was the controlling point. In this case we respectfully sub-

mit that the question of intention has nothing to do with the proposition. The law of Montana places the ban on all marginal purchases and sales, no matter what the intention of the parties might be.

A leading case in which this very question was decided adversely to the rule contended for by Respondent and directly in point with the case at bar, is *Parker v. Moore, 115 Fed. 799 (C. C.A.)*.

Moore, a resident of South Carolina, bought through James H. Parker & Co., cotton brokers on the New York Cotton Exchange, a line of cotton. The market went against him and he was closed out. Parker & Company sued him in the United States Circuit Court for the Fourth Circuit, and judgment went for Moore, the defendant. Parker & Company appealed. The following is a quotation from the decision, and appears final to us:

> "Various assignments of error are made by plaintiffs in error, but, in our view of the case, it will not be necessary to consider all of these at large.
>
> "The first assignment of error is as follows:
>
> " 'The testimony shows that the contracts out of which the plaintiffs' claim arose were made in New York, and to be performed in New York. As to their nature, interpreta-

tion, and obligation, the contracts were governed by the laws of New York, and not by the laws of South Carolina. The testimony shows that the contracts out of which the plaintiffs' claim arose were contracts for the future delivery of cotton made upon the floor of the New York Cotton Exchange; that under said rules actual delivery of the cotton was required; that under the laws of New York such contracts were valid and enforceable. The presiding judge should have so held.'

"This assignment of error cannot be sustained. The question as to the true meaning and intent of the contracts out of which the plaintiffs' claim arose was a proper subject of inquiry, and cannot be said to have been determinable independently of the effect of the statutes of South Carolina. It is undoubtedly true that ordinarily the validity and effect of a contract are to be determined by the law of the place where it was made, but this rule is subject to the exception that no nation or state is bound to recognize or enforce contracts made elsewhere, which are injurious to its own citizens or subjects. The only general rule that can be laid down is that contracts and liabilities, recognized as valid by the laws of the state or country where made or established, may be enforced in the courts of another state or country where the action is brought, unless contrary to morals, public policy or the positive law of the latter, in which event they will generally not be enforced. (Citing cases.)"

"In a line of decisions embracing Gist v. Telegraph Co., 45 S. C. 370, 23 S. E. 143,

> 55 Am. St. Rep. 763, Riordan v. Doty, 50 S. C. 547, 27 S. E. 939, and Harvey v. Doty, 54 S. C. 382, 32 S. E. 501, the Supreme Court of that state decided that suits brought therein for the enforcement of any right or claim arising out of a contract for the future delivery of cotton or the like must be governed, as to the interpretation of the contract and the morality of the claim, by the laws of South Carolina, even though the contract was made and to be performed in another state; this on the ground, as stated in Gist v. Telegraph Co., that 'contracts which are regarded as contra bonos mores in one state cannot be recognized there, although they are regarded as valid in another state where made and to be performed.'
>
> "The United States courts will follow the rules laid down by the highest court of a state in the matter of determining whether the lex loci contractus or the lex fori shall govern. The Federal courts will also follow the highest courts of the state in the construction of its statutes and its constitution, except where they may conflict with the constitution of the United States, or some statute or treaty made under it." (Citing cases.)

The following California case is directly in point. Between April 10th and 16th in the year 1900, Cutter & Moseley, stock brokers in the City and County of San Francisco, on the orders of Henry C. Stillwell, purchased for the account of said Stillwell in the City of New York, two hundred shares of the capital stock of the American

Steel & Wire Company, for which said Stillwell deposited with them the sum of Three Thousand and Seventy-one and 46/100 Dollars ($3071.46) as margin. That said shares were never delivered to plaintiff, and were purchased with the understanding that they were not to be delivered at the time of the purchase, but on the contrary, were to be delivered at some future time when the sum of money due the defendants on account of said purchase should be paid; in other words, the balance of the purchase price of the stock. The market went against Stillwell and he sued the brokers under the provision of Section 26 of Article IV. of the Constitution of California, which is as follows:

> "All contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future time, shall be void, and any money paid on such contracts may be recovered by the party paying it, in any court of competent jurisdiction."

The case was tried in the Superior Court and judgment was given for plaintiff. Defendants appealed and the decision of the Superior Court was affirmed.

Stillwell v. Cutter, 146 Cal. 657.

The last mentioned case is exactly in point with

the case at bar, as in that case the orders were given to a stock broker in San Francisco, who transmitted them to New York for the purchase of stock. The customer only deposited a portion of the purchase price with the broker. It was clearly a marginal transaction, the same as that of Forbis, and the California Constitutional provision was applied, making the contract void, and the customer was allowed to recover the money deposited as margin under the Constitutional provision which provided that money paid thereunder should be recovered, the same as Section 8430 of the Montana Revised Codes provided that Forbis might have recovered his money if he had proceeded in the proper manner.

In conclusion, we respectfully submit that the Respondent, having pleaded and having stipulated the facts that show his participation in breaking the law of the State of Montana, and having shown that his claim is founded upon such violation of the statutes of that state, cannot maintain his right to the money invested, the profits of the illegal transaction, and therefore his claim should be rejected.

HICKCOX & CRENSHAW,
Attorneys for Petitioner.

No. 1865

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE W. DWINNELL and JOHN GILPIN
(Defendants), Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA (Plaintiff),
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1865

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE W. DWINNELL and JOHN GILPIN
(Defendants), Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA (Plaintiff),
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

Index.

Index.

Index. Page

Index. Page

Names of Attorneys.

BERT SCHLESINGER, S. C. DENSON and A. P. VAN DUZER,

Attorneys for Plaintiffs in Error.

ROBERT T. DEVLIN, United States District Attorney, and A. P. BLACK, Assistant United States District Attorney,

Attorneys for the Defendant in Error.

[Stipulation Under Rule 23.]

In the United States Circuit Court of Appeals, Ninth Circuit, District of California.

G. W. DWINNELL and JOHN GILPIN,

Plaintiffs in Error,

vs.

THE UNITED STATES,

Defendant in Error.

ON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

It is hereby stipulated and agreed that the Clerk of the United States Circuit Court of Appeals may omit from the printed record in this cause Government Exhibits Numbers one (1), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), and Twelve (12), and also the Supersedeas Bonds of G. W. Dwinnell and John Gilpin and Justifications thereon, and all Or-

ders under sub. 1 of Rule 16, except that filed June 10, 1910, but without prejudice to either party to refer on argument to the original typewritten record transmitted to this Court from the District Court of the Northern District of California.

June 21, 1910.

ROBT. T. DEVLIN,
U. S. Attorney.
R. S. TAYLOR,
BERT SCHLESINGER,
S. C. DENSON,
Attorneys for Plaintiffs in Error.

[Endorsed]: No. 1865. In the United States Circuit Court of Appeals, Ninth Circuit, District Court of California. G. W. Dwinnell and John Gilpin, Plaintiffs in Error, vs. The United States, Defendant in Error. On Writ of Error from the United States District Court, Northern District of California. Filed Jun. 21, 1910. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

UNITED STATES OF AMERICA,
Defendant in Error,
vs.
GEORGE W. DWINNELL, JOHN GILPIN,
Plaintiffs in Error.

Order and Stipulation Extending Time to File Record.

It is hereby stipulated and agreed that the time for filing the transcript of record in the above-entitled cause by the plaintiffs in error George W. Dwinnell and John Gilpin is hereby extended to and including the 21st day of June, 1910.

Dated June 10, 1910.

S. C. DENSON,
R. S. TAYLOR,
BERT SCHLESINGER,
Attorneys for Plaintiffs in Error.
ROBT. T. DEVLIN,
United States Attorney.

The time to file transcript of record is ordered enlarged to and including the 21st day of June, 1910, for good cause shown, and pursuant to the above stipulation.

Dated San Francisco, Cal., June 10th, 1910.

MORROW,
Judge.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. United States of America, Defendant in Error, vs. George W. Dwinnell et al., Plaintiffs in Error. Stipulation and Order Extending Time to File Transcript of Record. Filed Jun. 10, 1910. F. D. Monckton, Clerk.

In the District Court of the United States, for the Northern District of California.

No. 4630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON, and REX F. DETER,

Defendants.

Praecipe for Transcript.

To the Clerk of said Court:

Sir: Please make return to the Writ of Error issued by transmitting to the United States Circuit Court of Appeals for the Ninth Circuit true copies of the following, namely:

1. The indictment in full, with all endorsements thereon.
2. The demurrer to said indictment.
3. Order overruling said demurrer.
4. Pleas of said defendants George W. Dwinnell and John Gilpin.
5. Minutes of trial.
6. Verdict.
7. Judgment.
8. Motion in arrest of judgment.
9. Order denying motion in arrest of judgment.
10. Motion of defendants George W. Dwinnell and John Gilpin for a new trial.
11. Order denying motion for new trial.

12. Petition for writ of error.
13. Assignment of errors.
14. Order allowing writ of error and supersedeas.
15. Bill of exceptions.
16. Bond on writ of error.
17. Copy of writ of error.
18. Also transmit original writ of error and original citation thereon, and certify to above as being the return to the writ of error, and also certify that copy of writ of error was lodged with clerk for defendant in error on date of issuance of writ.

Dated November 16th, 1909.

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Plaintiffs in Error.

[Endorsed]: Filed Nov. 16, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

5440, R. S.

Indictment.

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the State and Northern District of California, on the second Monday of July in the year of our Lord one thousand nine hundred and eight,

The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath present: That

GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON, and REX F. DETER,

hereinafter called the "defendants," each late of the Northern District of California, heretofore, to wit, on or about the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and six, in the County of Siskiyou in the State and Northern District of California then and there being, did then and there wilfully, unlawfully, knowingly and feloniously conspire, confederate and agree together and with divers other persons, to the Grand Jurors aforesaid unknown, to commit the crime of subornation of perjury against the United States, committed as follows; that they, the said George W. Dwinnell, John Gilpin, John D. Gagnon, and Rex F. Deter, the defendants herein, did then and there so conspire, confederate and agree together to unlawfully, wilfully and corruptly suborn, instigate and procure James Fredreck French, Benjamin F. French, Frederick M. French, Samuel L. French, Clarence M. Prather, and Arthur W. Jaquette, to commit the offense of perjury in the State and Northern District of California, by appearing before Clarence W. Leininger, the duly appointed, qualified and acting Register of the United States Land Office at Redding, California, on the thirty-first day of October in the year of our Lord one thousand nine hundred and six, and respectively

take an oath to a sworn statement under the Timber and Stone Lands Acts of the United States, in which sworn statements each of the affiants so named should swear that he "did not apply to purchase the land described in said sworn statement on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract or in any way or manner with any person or persons whomsoever, by which the title he might acquire from the Government of the United States would inure in whole or in part to the benefit of any person except himself." Which said sworn statements after being so sworn to before the said Clarence W. Leininger, Register as aforesaid, were to be filed in the said United States Land Office at Redding, California, by each of the persons so subscribing and swearing to the said sworn statement respectively, and which sworn statements so to be sworn to and filed with the Register of the United States Land Office as aforesaid, should be known by each of the said applicants to be false in the material matter therein to be sworn to, in this, that each of the persons at the time of so subscribing and swearing to his respective sworn statement, had an agreement beforehand, and an express understanding that the title he was to secure, and the land he was to apply for in his sworn statement, was for the benefit of the said defendants; and the defendants and each of them, then and there at the time of so conspiring as aforesaid, well knew that the said sworn statements

aforesaid, so to be filed, would be wilfully false in the said material matter just before stated.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that to carry into effect the said unlawful conspiracy, the said defendants did procure a number of blank Timber and Stone Land Sworn statements under the rules prescribed under said Acts, and did fill out the said sworn statements for land of the United States to be open for entry under the Timber and Stone Act of June 3d, 1878, as extended to all the public land States by the Act of August 4, 1892, as follows:

The sworn statement of James Fredreck French was filled in for the East half of the East half of section twelve, township forty-four North, Range two West, M. D. M., in the District of lands subject to sale at Redding, California.

The sworn statement of Benjamin F. French was filled in for lots numbers one and two; the southwest quarter of the northeast quarter; the northwest quarter of the southeast quarter of section one in township forty-three north, range one west, M. D. M., in the said District of lands subject to sale at Redding, California.

The sworn statement of Frederick M. French was filled in for the west half of the west half of section twelve, township forty-five north, range three west, M. D. M., in the said District of lands subject to sale at Redding, California.

The sworn statement of Samuel L. French was filled in for the south half of the northeast quarter; and the east half of the southwest quarter of section

eight, township forty-four north, range two west, M. D. M., in the same district.

The sworn statement of Clarence M. Prather was filled in for the east half of the southwest quarter; and the northwest quarter of the southwest quarter; and the southwest quarter of the northwest quarter of section fourteen, township forty-four north, range two west, M. D. M., in the same district.

The sworn statement of Arthur W. Jaquette was filled in for the southwest quarter of section thirty-four, township forty-five north, range three west, M. D. M., in the same district.

And thereafter, the said defendants on or about the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and six, in the County of Shasta, in the State and Northern District of California, did cause the said James Fredreck French, Benjamin F. French, Frederick M. French, Samuel L. French, Clarence M. Prather and Arthur W. Jaquette, to take their place in line in front of the Land Office at Redding, in the State and Northern District of California, so that they, the said James Frederick French, Benjamin F. French, Frederick M. French, Samuel L. French, Clarence M. Prather and Arthur W. Jaquette, would be among the first who would have the privilege of putting in their sworn statements upon the thirty-first day of October, in the year of our Lord one thousand nine hundred and six, thereafter, and the said defendant George W. Dwinnell did furnish money to the said James Fredreck French, Benjamin F. French, Frederick M. French, Samuel L.

French, Clarence M. Prather, and Arthur W. Jaquette, to pay their expenses while so standing in line waiting the opportunity to present their sworn statements aforesaid, the exact amount of which money is to the Grand Jurors aforesaid, unknown, but which approximated the sum of Sixty-five (65) Dollars.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that to carry out the unlawful conspiracy heretofore mentioned, the said defendants did cause the said James Fredreck French, Benjamin F. French, Frederick M. French, Samuel L. French, Clarence M. Prather, and Arthur W. Jaquette to appear before the said Clarence W. Leininger, the Register aforesaid, at the United States Land Office at Redding, in the State and Northern District of California, on the thirty-first day of October in the year of our Lord one thousand nine hundred and six, and sign and take oath to, and each of them being sworn upon the said last mentioned date by the said Clarence W. Leininger, who was then and there an officer empowered to administer an oath, and who did then and there administer an oath to each of the said applicants upon his sworn statement, and each of the above-named applicants so sworn by the said Clarence W. Leininger, Register aforesaid, did, for himself, falsely, feloniously, and wilfully swear, take oath, and say, among other things, as follows, to wit:

"* * *; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use

and benefit, and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself," etc.

Whereas in truth and in fact, as each of the said applicants then and there well knew, the said applicant did not apply to purchase the land described in his application in good faith to appropriate it for his own exclusive use and benefit, and whereas in truth and in fact, as each of the said applicants then and there well knew, the said applicants and each of them had directly made an agreement and contract with the said George W. Dwinnell that the application should be made for the benefit of the said George W. Dwinnell, and each of the defendants then and there knew that each of the applicants so swearing to his sworn statement, had so made the contract as aforesaid, whereby the title to the land should be transferred to the said George W. Dwinnell, and each of the defendants then and there well knew that each of the applicants so swearing to the sworn statements was committing the crime of perjury in so swearing.

And the Grand Jurors aforesaid, on their oath aforesaid do further present that to carry into effect the purpose of the unlawful conspiracy aforesaid, the said George W. Dwinnell did thereafter, on the twenty-third day of November, in the year of our Lord one thousand nine hundred and six, procure a relinquishment from the said James Fredreck

French, and did thereafter, on the thirtieth day of November in the year of our Lord one thousand nine hundred and six, procure from the said James Fredreck French, a further relinquishment, which the said George W. Dwinnell filled out and procured the said James Fredreck French to sign, in consideration of two hundred ($200) dollars, which sum had been theretofore, before the sworn statement of the said James Fredreck French had been filed in the Land Office aforesaid, agreed to be paid to the said James Fredreck French as the price of his taking up the said land and making his application for the benefit of the said George W. Dwinnell.

And further, that the said George W. Dwinnell, did likewise prepare a relinquishment and did cause the said Benjamin F. French to sign the same on November twenty-sixth one thousand nine hundred and six, and on November thirtieth one thousand nine hundred and six, the said George W. Dwinnell did cause the said Benjamin F. French to sign a further relinquishment, upon the signing of which relinquishment the said George W. Dwinnell did pay to the said Benjamin F. French the sum of two Hundred (200) Dollars, the price which had theretofore been agreed upon for which the said Benjamin F. French should make his aforesaid application and sworn statement to purchase the said lands hereinbefore mentioned for the use and benefit of the said George W. Dwinnell.

And further, that the said George W. Dwinnell, did, upon the twenty-fourth day of November, one thousand nine hundred and six, prepare a relinquish-

ment, and cause the said Frederick M. French to sign the same, for the lands which had theretofore been applied for by the said Frederick M. French, and the said Frederick M. French was paid by the said George W. Dwinnell the sum of Two Hundred (200) Dollars, as the price theretofore agreed upon before the filing of the said application in the United States Land Office as aforesaid, for which the said Frederick M. French was to take up the said land and make his sworn statement for the benefit of the said George W. Dwinnell.

And further, that the said George W. Dwinnell did, upon the twelfth day of November, one thousand nine hundred and six, prepare a relinquishment to be signed by the said Samuel L. French, of the lands so applied for by the said Samuel L. French, and further, that the said George W. Dwinnell did, upon the thirtieth day of November, one thousand nine hundred and six, prepare an additional relinquishment of the said lands so entered by said Samuel L. French upon the blank form provided by the United States Land Office for that purpose, and the said George W. Dwinnell did pay to the said Samuel L. French, the sum of Two Hundred (200) Dollars on the said last mentioned date, as the price theretofore agreed upon for which the said Samuel L. French would enter the said land and apply for the purchase of the same for the use and benefit of the said George W. Dwinnell.

And further, the said George W. Dwinnell did prepare in his own handwriting, on November twenty-second, one thousand nine hundred and six, a re-

linquishment to be signed, and it was then and there signed on said last named date, by Clarence M. Prather, and the said George W. Dwinnell did further prepare an additional relinquishment upon the blank form provided by the United States Land Office for that purpose, which relinquishment was, upon the first day of December, one thousand nine hundred and six, filled in by the said George W. Dwinnell and signed by the said Clarence M. Prather, and the said George W. Dwinnell did then and there pay to the said Clarence M. Prather, the sum of One Hundred and Fifty-seven (157) Dollars, on account of the sum of Four Hundred (400) Dollars agreed to be paid to the said Clarence M. Prather, prior to the thirty-first day of October, one thousand nine hundred and six, and prior to the filing of the sworn statement of the said Clarence M. Prather heretofore referred to.

And further to carry into effect the said conspiracy, the said George W. Dwinnell did cause the said Arthur W. Jaquette to sign a relinquishment for the land which he, the said Arthur W. Jaquette, had theretofore applied for, and the said George W. Dwinnell did pay to the said Arthur W. Jaquette the sum of Two Hundred (200) Dollars, the amount which had been agreed upon prior to the thirty-first day of October, one thousand nine hundred and six, as the price for which the said Arthur W. Jaquette should make entry of the said land for the benefit of the said George W. Dwinnell.

Against the peace and dignity of the United States of America, and contrary to the form of the statute

of the said United States of America in such case made and provided.

ROBT. T. DEVLIN,
United States Attorney.

Names of witnesses examined before the said *Grand on* finding the foregoing Indictment:

FREDERICK M. FRENCH,
CLARENCE M. PRATHER,
ARTHUR W. JAQUETTE,
JAMES F. FRENCH,
BENJAMIN F. FRENCH,
W. S. KINGSBURY,
G. W. DWINNELL,
CLARENCE W. LEININGER,
ODELL FELLOWS,
O. W. LANG,
A. CHRISTENSEN.

[Endorsed]: A True Bill. Walter M. Castle, Foreman Grand Jury. Presented and filed Oct. 30, 1908, in open court. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Demurrer of George W. Dwinnell to Indictment.]

In the District Court of the United States, in and for the Northern District of California.

No. 4630.

THE PEOPLE OF THE UNITED STATES

vs.

GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON, and REX F. DETER.

SEPARATE DEMURRER OF GEORGE W. DWINNELL.

Now comes George W. Dwinnell, one of the defendants in the above-entitled action, and demurs to the indictment in said action and for cause, shows:

I.

That said indictment does not state facts sufficient to constitute a public offense against the United States.

II.

That said indictment does not state facts sufficient to constitute a public offense against the United States in this, that said indictment does not allege that said applicants or any or either of them were duly sworn to the said sworn statement.

III.

That said indictment does not state facts sufficient to show that the crime of perjury was committed by the persons or either of them who are alleged to have been suborned by defendants.

IV.

That said indictment does not allege that defendant knew that the persons making said applications knew that the statements which they are alleged to have made were intentionally and wilfully false on their part.

V.

That said indictment does not state or set out facts sufficient to constitute the crime of subornation of perjury.

VI.

That said indictment is ambiguous, and it cannot be ascertained therefrom whether defendants are charged with procuring said applicants to swear to a joint sworn statement or whether defendants are charged with procuring said applicants to swear each to a separate statement.

VII.

That said indictment is uncertain for the reasons set forth in paragraph six herein.

VIII.

That said indictment for the reasons set forth in paragraph six herein is unintelligible.

IX.

That said indictment attempts to charge several distinct offenses in one count, to wit, six distinct and separate offenses.

X.

That the allegations in said indictment which attempt to charge the crime of perjury on the part of said applicants are insufficient and immaterial, in

this, that it is not alleged therein that there was any agreement or contract of any kind or character between themselves or any of them and defendants or either of them or any other person, whereby or by which the title said applicants or either of them might acquire from the Government of the United States to the lands described in the several applications and by means thereof would or might inure in whole or in part to the defendants or either of them or to any person whatever except said applicants.

XI.

That said indictment fails to state facts sufficient to constitute a public offense against the United States in this, that it is not alleged that the lands set out and described in the several sworn statements were public lands of the United States and open for entry under the Timber and Stone Act of June 3d, 1878, as extended to the public land State by Act of August 4, 1892, or by any other act.

Wherefore, said defendant Dwinnell prays that said bill of indictment be dismissed, and that he go hence without day.

R. S. TAYLOR and
S. C. DENSON,
Attorneys for Defendant.

Service of the within demurrer by copy acknowledged this 11th day of May, A. D. 1909.

ROBT. T. DEVLIN,
U. S. Atty.

[Endorsed]: Filed May 11, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Order of Court Overruling Demurrer to Indictment.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 19th day of May, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4,630.

UNITED STATES OF AMERICA

vs.

GEO. W. DWINNELL et al.

The Demurrer to the Indictment herein by George W. Dwinnell, having been heretofore submitted to the Court for decision, now after due consideration had thereon, the Court files its written Opinion, and by the Court ordered that said Demurrer be, and the same is hereby, overruled.

In the District Court of the United States, for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL et al.

Opinion Overruling Demurrer to Indictment.

DE HAVEN, District Judge.—The defendant Dwinnell has demurred to the Indictment upon the general ground that it does not state facts sufficient to charge him with the commission of a public offense. After a careful consideration of the allegations of the indictment my conclusion is that it sufficiently charges that the defendant, and others, conspired to commit the crime of subornation of perjury; in that said defendant, and others, agreed to instigate and procure the persons named in the indictment to file in the United States Land Office at Redding, California, sworn statements, in which they should apply to purchase the land therein described, and that in their respective statements each of said persons should swear that he "did not apply to purchase the land described in said sworn statement on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract or in any way or manner with any person or persons whomsoever, by which the title he might acquire from the Government of the United States would inure in whole or in part to benefit of any person except himself."

The indictment further alleges that at the time of entering into the conspiracy the defendant knew that the said sworn statements, when made, would be wilfully false and would be known "by each of said applicants to be false in the material matter

therein to be sworn to, in this, that each of the persons at the time of so subscribing and swearing to his respective sworn statement, had an agreement beforehand, and an express understanding that the title he was to secure, and the land he was to apply for, in his sworn statement, was for the benefit of the said defendants; and the defendants and each of them, then and there at the time of so conspiring, as aforesaid, well knew that the said sworn statement, aforesaid, so to be filed, would be wilfully false in the said material matter just before stated."

It will be observed that the conspiracy, as charged in the indictment, lies within very narrow limits. The indictment does not charge that the defendants conspired to defraud the United States by procuring the persons named in the indictment to cover the land applied for with dummy or temporary applications for the purpose of obstructing or preventing the entry of such land by bona fide applicants, and which dummy applications were to be relinquished upon the request of the defendants, nor does it charge that the defendants entered into a conspiracy to suborn the persons filing such dummy applications to commit perjury in swearing to that part of their respective application which recites that the applicant does not apply to purchase the land "on speculation but in good faith to appropriate it to his own exclusive use and benefit."

It is true the indictment in its statement of overt acts would seem to indicate that there was evidence before the Grand Jury tending to show the commission of one or both of the offenses just referred to,

but conspiracy charged is that both defendants conspired to induce the persons to commit perjury, in swearing that they had made no agreement directly or indirectly by which the title they might acquire, from the Government, should inure in whole or in part to the benefit of any other person or persons—than the applicant—whereas, in fact, each of said persons, at the time of so swearing, would have an agreement "and an express understanding that the title he was to secure, and the land he was to apply for, in his sworn statement, was for the benefit of the said defendants."

It is, of course, well settled that the conspiracy charged cannot be enlarged or aided by the averment of acts done by one or more of the conspirators, even though it is alleged that such acts were done in furtherance of the object of the conspiracy.

United States vs. Button, 108 U. S. 199.

THE DEMURRER OF DEFENDANT DWINNELL IS OVERRULED.

[Endorsed]: Filed May 19, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Minutes of Court—October 27, 1909—Arraignment, Plea, etc.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 27th day of October, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL, JOHN GILPIN and REX F. DETER.

The above-named defendants, with their attorneys, Messrs. Bert Schlesinger, S. C. Denson, A. P. Van Duzer and R. S. Taylor, being present in open Court, on motion of A. P. Black, Asst. U. S. Atty., said defendants were arraigned upon the Indictment herein against them, and then and there each entered a plea of Not Guilty. By the Court ordered that the trial of this case do now proceed, the following named jurors were duly drawn, accepted, sworn and impaneled to try the issues joined in this case, to wit:

Chas. Kahler,	Ernest Woodman,
John A. Jones,	George H. Mendell, Jr.,
Frank A. Wilkie,	Harry Henrici,
Wm. E. Doud,	Ellis H. Parrish,
C. W. Whitney,	Phillip P. Paschel, and
Wm. P. Ransom,	Albert F. Kindt.

The following named jurors were peremptorily challenged by defendants and by the Court excused: Julian Sonntag, Karl Eber and J. M. Donlon. By the Court ordered that all witnesses except the one on the stand retire from the courtroom.

Mr. Black, the Asst. U. S. Atty., thereupon stated the case to the Court and jury and called Frederick M. French, who was duly sworn and examined as a witness on behalf of the United States, and called W. S. Kingsbury, Clarence M. Prather, James F. French, Samuel Leonard French, who were each duly sworn and examined as witnesses on behalf of the United States. Mr. Black introduced certain exhibits which were by the Court ordered marked United States Exhibits No. 1, 2, 3, 4, 5, 6, 7, and 8, respectively. One exhibit was introduced by Defendants and marked Defendants' Exhibit No. 1.

Thereupon by the Court ordered that the further trial of this case be, and the same is hereby continued until October 28, 1909, at 10 o'clock A. M.

[Trial—Minutes of Court—October 28, 1909.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 28th day of October, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL et al.

The defendants herein with their attorneys and the jury sworn to try the case, being present in open court, the further trial of this case was resumed. Mr. A. P. Black, Asst. U. S. Atty., called Benj. F. French, Mrs. F. M. French, Arthur M. Jacquette, Clarence W. Leininger, who were each duly sworn and examined as witnesses on behalf of the United States, and introduced in evidence certain exhibits which were marked United States Exhibits No. 9, 10, and 11, respectively.

Mr. S. C. Denson, attorney for defendant Geo. W. Dwinnell, made a statement to the jury in behalf of the defendants. Mr. Bert Schlesinger, attorney for said Dwinnell, called G. H. Chambers, Solon H. Williams, M. V. Purdy, Arthur Simon, Chas. J. Lutrell, John F. Fairchild, E. J. Loosley, H. H. Hudson, John J. Perkins, L. J. Roher, John Samuel Musgrave, J. B. Dowling, R. F. Deter, John Gilpin, and G. W. Dwinnell, who were each duly sworn and examined as witnesses on behalf of the defendants, and thereupon by the Court ordered that the further trial of this case be, and the same is hereby continued until October 29, 1909, at 10 o'clock A. M.

[Trial—Minutes of Court—October 29, 1909.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 29th day of October, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL et al.

The defendants herein with their attorneys, and the jury sworn to try the case, being present in open court, the further trial of this case was resumed. Mr. Bert Schlesinger attorney for defendant Dwinnell, recalled Geo. W. Dwinnell, who was further examined, and called David I. Mahoney, who was duly sworn and examined as a witness on behalf of the defendants. Mr. A. P. Black, Asst. U. S. Atty., recalled F. M. French, and Clarence Prather, who were each further examined. The case was thereupon argued by the said Mr. Black on behalf of the Government, and the said Mr. Schlesinger in behalf of the defendants, and pending the argument of Mr. Schlesinger, by the Court ordered that the further trial of said case be, and the same is hereby continued until Monday, November 1, 1909, at 10 o'clock A. M.

[Trial—Minutes of Court—November 1, 1909.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 1st day of November, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL et al.

The defendants with their attorneys and the jury sworn to try the case being present in open court, the further trial of this case was resumed. Mr. R. S. Taylor, attorney for the defendants, argued the case to the jury and was followed by Mr. A. P. Black, Asst. U. S. Atty., who closed the case for the United States, and thereupon the Court charged the jury, who at 4 o'clock P. M. and five minutes P. M. retired to deliberate upon their verdict, and at 5 o'clock P. M. said jury returned into Court and upon being asked by the Court if they had agreed upon a verdict, replied in the affirmative and rendered the following in writing: "We, the Jury, find George W. Dwinnell, the prisoner at the bar, Guilty. E. D. Woodman, Foreman. We, the Jury find, John Gilpin, the prisoner at the bar, Guilty. E. D. Wood-

man, Foreman. We, the Jury, find Rex F. Deter, the prisoner at the bar, Not Guilty. E. D. Woodman, Foreman."

By the Court ordered that the jurors in this case be now discharged. Further ordered, that Wednesday November 3, 1909, at 10 o'clock A. M. be, and the same is hereby fixed as the time for pronouncing Judgment herein.

In the District Court of the United States, in and for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL et al.

Verdict as to George W. Dwinnell.

We, the Jury, find George W. Dwinnell, the prisoner at the bar, Guilty.

E. D. WOODMAN,
Foreman.

[Endorsed]: At 5 o'clock and —— min. P. M. Filed Nov. 1, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

JOHN GILPIN et al.

Verdict as to John Gilpin.

We, the Jury, find John Gilpin, the prisoner at the bar, Guilty.

E. D. WOODMAN,
Foreman.

[Endorsed]: At 5 o'clock and —— min. P. M. Filed Nov. 1, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

REX F. DETER et al.

Verdict as to Rex F. Deter.

We, the Jury, find Rex F. Deter, the prisoner at the bar, Not Guilty.

E. D. WOODMAN,
Foreman.

[Endorsed]: At 5 o'clock and —— min. P. M. Filed Nov. 1, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Judgment.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 13th day of November, in the year of our Lord one thousand nine hundred and nine, present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL and JOHN GILPIN.

Convicted of the Offense of Conspiracy to Commit Subornation of Perjury.

Sec. 5440. R. S.

JUDGMENT ON PLEA OF NOT GUILTY.

A. P. Black, Esq., Assistant United States Attorney, and the defendants with Bert Schlesinger, Esq., S. C. Denson, and R. S. Taylor, their attorneys, came into court. No legal cause being shown why Judgment should not be pronounced against the defendants; motions by each defendant for a new trial and in arrest of Judgment having been overruled, thereupon the Court rendered its Judgment.

THAT WHEREAS, the said George W. Dwinnell and John Gilpin, having been duly convicted in this court of the offense of Conspiracy:

IT IS THEREFORE ORDERED AND ADJUDGED, that each of said defendants pay a fine

of One Thousand (1000) Dollars, and that they be imprisoned for the term of One Year.

FURTHER ORDERED AND ADJUDGED that said Judgment of imprisonment be executed upon the said defendants, George W. Dwinnell and John Gilpin, by imprisonment in the County Jail of the County of Alameda, State of California.

JOHN J. DE HAVEN,
United States District Judge, Northern District of California.

[Endorsed]: Filed Nov. 13, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,
Defendants.

Motion to Arrest Judgment.

The defendants in the above-entitled cause, before Judgment, respectfully move the Court for error appearing on the face of the Indictment and upon the face of the record, that Judgment for the Government be arrested and withheld and the conviction rendered herein be declared null and void.

Said motion is based on the following grounds:

(1) That the Indictment herein fails to charge

the offense of conspiracy to commit the crime of subornation of perjury against the United States.

(2) That the Indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

(3) That the Indictment fails to charge that any public lands of the United States were the subject of any conspiracy.

(4) That the Indictment fails to charge that the entrymen were to apply to purchase any public lands of the United States over which the Register and Receiver of the Land Office at Redding, California, had jurisdiction.

(5) That the Indictment fails to charge that the entryman had applied to purchase any public lands situated within the Shasta or Redding Land District of the United States.

(6) That the Indictment fails to charge that any application was to be made to purchase any public lands of the United States within the land district over which the Register therein named had any jurisdiction.

(7) The Indictment fails to charge that the entrymen were to be induced, or were induced, or procured, to make entries of public lands of the United States within the Shasta or Redding Land Districts, or within any district over which the Register therein mentioned had jurisdiction.

(8) That the Indictment fails to charge that the alleged perjury, or subornation of perjury, was to occur in any proceedings for the entry or purchase of land situated in the Shasta or Redding Land Districts under the Timber and Stone Act.

(9) That the Indictment fails to charge that the sworn statements referred to therein were to be verified by the oaths of the applicants before the Register or Receiver of any Land Office within the District where the lands were situated.

(10) That the Indictment fails to show that any lands were subject to entry at the land office at Shasta or Redding or were subject to entry before said Register.

(11) That the Indictment fails to show or state a case in which any oath was required or permitted to be administered by such Register, as it does not show that such Register had jurisdiction over the matters therein referred to.

(12) The Indictment does not show that public lands of the United States were to be entered or purchased.

(13) The Indictment does not show that the said Clarence W. Leninger, had due or competent authority, or any authority, to administer any oath to any of the entrymen, in the Indictment referred to.

(14) The Indictment does not show that the said Leninger was to administer an oath concerning lands situate within the District over which he had jurisdiction.

Wherefore, defendants pray that said Judgment be arrested and that no sentence be had therein.

And will ever pray.

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 13, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,

Defendants.

Motion for a New Trial.

Now come the defendants and move the Court for a new trial in the above-entitled cause upon the following grounds:

(1) That the Verdict was against the evidence.

(2) That the Court erred in admitting certain evidence relating to relinquishments filed by the entryman.

(3) That the Court erred in failing to give Instruction No. 42, requested by the defendants.

(4) That the Court erred in failing to give Instruction No. 37, requested by defendants, relating to good character.

(5) That Court erred in failing to give Instruction No. 38, relating to good character, requested by defendants.

(6) That the Court erred in failing to give Instruction No. 47, relating to animus or bias, requested by defendants.

(7) That the Court erred in failing to give Instruction No. 45, requested by defendants, relating to the insufficiency of the evidence.

(8) That the Court erred in failing to give Instruction No. 46, requested by defendants, relating to insufficiency of the evidence.

(9) That the errors of the Court in respect to the above matters were and are of a substantial character, and were to the great detriment, injury and prejudice of the defendants, and in violation of the rights conferred upon them by law.

Wherefore, defendants pray that the verdict be set aside and a new trial granted.

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 13, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Order Denying Motion in Arrest of Judgment and for a New Trial.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 13th day of November, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL and JOHN GILPIN.

The above-named defendants with their attorneys, Messrs. Bert Schlesinger, S. C. Denson, and R. S. Taylor, this day came into court. The said Mr. Schlesinger, in behalf of said defendants, filed written motions in arrest of Judgment and for a new trial herein, and after hearing argument by counsel for defendant in support thereof, and A. P. Black, Asst. U. S. Atty., in opposition thereto, by the Court ordered that each of said motions be and the same are hereby denied, to which ruling defendants then and there duly excepted.

Thereupon by the Court ordered that said defendants, for the offense of which they stand convicted be and they are hereby sentenced to pay a fine of $1,000 each, and each to be imprisoned for the term of one year. Further ordered that said Judgment of imprisonment be executed upon the said defendants, by imprisonment in the County Jail of Alameda County, California.

On motion of Mr. Schlesinger, by the Court ordered that execution of Judgment herein be, and the same is hereby stayed for five days.

In the District Court of the United States in and for the Northern District of California.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,
Defendants.

Petition for Writ of Error.

Your petitioners, the above-named defendants, George W. Dwinell, and John Gilpin, bring this their petition for Writ of Error to the District Court of the United States in and for the Northern District of California, and in that behalf your petitioners show:

(1) That on the 13th day of November, 1909, there was made, given and rendered in the above-entitled cause a judgment against your petitioners, wherein and whereby each of your petitioners was adjudged and sentenced to imprisonment for a term of one year in the Alameda County Jail and to pay a fine of One Thousand ($1,000.00) Dollars; and your petitioners show that they are advised by counsel, and they aver that there was and is manifest error in the record and proceedings had in said cause and in the making, giving and rendition and entry of said judgment and sentence to the great injury and damage of your petitioners, all of which errors will

be more fully made to appear by an examination of the said record, and by an examination of the bill of exceptions to be tendered and filed and in the assignment of errors hereinafter set out and to be presented herewith; and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners now pray that a Writ of Error may be issued, directed therefrom to the said District Court of the United States for the Northern District of California, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause and that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected, and full and speedy justice done your petitioners.

And your petitioners make the assignment of errors presented herewith, upon which they will rely and which will be made to appear by a return of the said record in obedience to the said Writ.

Wherefore, your petitioners pray the issuance of a Writ as herein prayed, and pray that the assignment of errors, presented herewith, may be considered as their assignment of errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that they

be awarded a supersedeas upon said judgment and all necessary and proper process, including bail.

G. W. DWINNELL,
JOHN GILPIN,
Petitioners.

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 15, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,
Defendants.

Order Allowing Writ of Error and Supersedeas.

The writ of error and the supersedeas therein prayed for by defendants George W. Dwinell and John Gilpin, pending the decision upon the writ of error are hereby allowed, and each of the defendants is admitted to bail upon the writ of error in the sum of Three Thousand Dollars. The bond for costs

upon the writ of error is hereby fixed at the sum of Two Hundred and Fifty Dollars.

Dated November 15, 1909.

JOHN J. DE HAVEN,

District Judge of the United States for the Northern District of California.

[Endorsed]: Filed Nov. 15, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,

Defendants.

Assignment of Errors.

ASSIGNMENT OF ERRORS OF DEFENDANTS, GEORGE W. DWINELL and JOHN GILPIN.

George W. Dwinell and John Gilpin, defendants in the above-entitled cause, and plaintiffs in error herein, having petitioned for an order from said Court permitting them to procure a Writ of Error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and entered in said cause against said George W. Dwinell and John Gilpin, now make and file with their said petition the

following assignment of errors herein, upon which they will apply for a reversal of said judgment and sentence upon the said Writ, and which said errors, and each, and every one of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon them by law; and they say that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States, for the Northern District of California, there is manifest error in this, to wit:

1. That the said District Court erred in overruling the demurrer of the said defendant George W. Dwinnell, to the indictment filed in said cause upon the grounds in said demurrer set forth.

2. The Court erred in refusing to give Instruction No. 42 requested by defendant: "I charge you that if you find from the evidence in this case that any witness has wilfully testified falsely as to any material matter involved in the case, it is your duty, under the law of this State, to distrust the entire testimony of such witness"; to which refusal an exception was duly made and entered at the time.

3. The Court erred in refusing to give Instruction No. 37, requested by defendants: "If the jury are satisfied from the evidence that the defendants have established a good character for truth, honesty and integrity, then such good character of itself may be sufficient to raise a doubt as to the defendants' guilt"; to which refusal an exception was duly made and entered at the time.

4. The Court erred in refusing to give Instruction No. 38, requested by defendants: "The defendants in this case have introduced evidence of their good character for truth, honesty and integrity. If you believe from the evidence that the good character of the defendants for truth, honesty and integrity is proven to your satisfaction, then such fact is to be kept in view by you throughout all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendants, you entertain any reasonable doubt of the defendants' guilt then it is your duty to return a verdict of not guilty"; to which refusal an exception was duly made and entered at the time.

5. The Court erred in refusing to give Instruction No. 45, requested by defendants: "I charge you to return a verdict of not guilty in this case for the reason that the evidence does not warrant the submission of the case to the jury"; to which refusal an exception was duly made and entered at the time.

6. The Court erred in refusing to give Instruction No. 46, requested by defendants: "I advise you to return a verdict of not guilty in this case because of the insufficiency of the evidence given by the Government"; to which refusal an exception was duly made and entered at the time.

7. The Court erred in refusing to give Instruction No. 47, requested by defendants: "I charge you that in considering the weight to be given by you to the testimony of any witness in this case you have

the right to take into consideration the animus or the bias of such witness, if such animus or bias appears"; to which refusal an exception was duly made and entered at the time.

8. The Court erred in overruling the motions of the defendants for new trial and in not allowing the same.

9. The Court erred in overruling and denying said defendants' motion in arrest of judgment upon the grounds in said motion taken and assigned, to wit:

(a) That the indictment herein fails to charge the offense of conspiracy to commit the crime of subornation of perjury against the United States.

(b) That the indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

(c) That the indictment fails to charge that any public lands of the United States were the subject of any conspiracy.

(d) That the indictment fails to charge that the entrymen were to apply to purchase any public lands of the United States over which the Register and Receiver of the Land Office at Redding, California, had jurisdiction.

(e) That the indictment fails to charge that the entrymen had applied to purchase any public lands situated within the Shasta or Redding Land District of the United States.

(f) That the indictment fails to charge that any application was to be made to purchase any public lands of the United States within the land district

over which the Register therein named had any jurisdiction.

(g) The indictment fails to charge that the entrymen were to be induced, or were induced, or procured, to make entries of public lands of the United States within the Shasta or Redding Land Districts, or within any district over which the Register therein mentioned had jurisdiction.

(h) That the indictment fails to charge that the alleged perjury, or subornation of perjury, was to occur in any proceedings for the entry or purchase of land situated in the Shasta or Redding Land Districts under the Timber and Stone Act.

(i) That the indictment fails to charge that the sworn statements referred to therein were to be verified by the oaths of the applicants before the Register or Receiver of any land office within the district where the lands were situated.

(j) That the indictment fails to show that any lands were subject to entry at the land office at Shasta or Redding, or were subject to entry before said Register.

(k) The indictment fails to show or state a case in which any oath was required or permitted to be administered by such Register, as it does not show that such Register had jurisdiction over the matters therein referred to.

(l) The indictment does not show that public lands of the United States were to be entered or purchased.

(m) The indictment does not show that the said Clarence W. Leininger had due or competent author-

ity, or any authority, to administer any oaths to any of the entrymen in the indictment referred to.

(n) The Indictment does not show that the said Leininger was to administer an oath concerning lands situate within the district over which he had jurisdiction.

10. The Court erred in overruling objection to the following questions propounded to the witness F. M. French, the following having occurred at the trial in this connection:

"Q. Did you have any conversation with Dr. Dwinell in regard to obtaining relinquishments from any of your sons?

Mr. SCHLESINGER.—Object to that unless the time is fixed, as time is of all importance in this transaction. If he had the talk subsequent to the locations, it is perfectly proper. If he had it prior to the locations, the Government might make some other claim. We object, unless time and place are fixed.

The COURT.—Fix the time.

Mr. BLACK.—Q. The conversations would be after the 31st day of October, and between that and the 1st day of December, 1906.

Mr. SCHLESINGER.—That is not sufficient, unless it is an agreement made prior to the location.

Mr. BLACK.—I do not understand that that is the rule. Anything that any conspirator says or does at any time that has relation to the original scheme as against that conspirator is pertinent and competent testimony. That is my understanding of the rule. It is not anything that occurs after the

consummation. It does not bind anyone except the individual who makes the statement, or does the act, but as to him I think it is entirely competent.

The COURT.—The objection will be overruled.

Mr. SCHLESINGER.—We take an exception."

11. The Court erred in overruling defendants' objection to the introduction in evidence of Government's Exhibit No. 6; the following proceedings having occurred in connection therewith:

"Mr. BLACK.—I ask now, if the Court please, that this application number 4825 in duplicate together with two relinquishments be marked Government's Exhibit No. 6.

Mr. SCHLESINGER.—Will you show them to us, Mr. Black?

Mr. BLACK.—Certainly.

Mr. SCHLESINGER.—I simply wish to interpose a very formal objection to these, if the Court please. Your Honor will see from an inspection of these papers that they appear to be dated long after these locations—one bears date December 1, 1906, and the other bears the date November 26, 1906. If they are evidence at all they are evidence in our favor.

The COURT.—The objection will be overruled; let them go in evidence.

Mr. SCHLESINGER.—Exception."

12. The Court erred in overruling defendants' objection in the following matter, occurring during the examination of the witness, F. M. French:

"Mr. BLACK.—Q. After having been to the office, later on, did you have any business with any of

the defendants in relation to this land and relinquishment of it?

Mr. SCHLESINGER.—I object to any testimony as to subsequent transactions. Any transaction prior to the making of the location would be admissible.

The COURT.—It is admissible as against some of the defendants, that is if it is a relevant fact.

Mr. SCHLESINGER.—I think Mr. Black ought to specify the defendant.

Mr. BLACK.—Q. Did you have any dealing with Dr. G. W. Dwinell in reference to getting your relinquishment for that land?

Mr. SCHLESINGER.—Objected to as immaterial, irrelevant and incompetent, and occurring at the time long subsequent to the taking up of the land by the witness, and hence is not inhibited by the law.

The COURT.—The objection is overruled. Testimony of that character is relevant against the defendant Dwinell in my judgment.

Mr. SCHLESINGER.—We will take an exception.

A. I had no transactions with him until the time of relinquishment.

Mr. SCHLESINGER.—In view of that testimony, I ask that the prior statement be stricken out—all his prior statement on that subject.

The COURT.—Let it remain.

Mr. BLACK.—Q. What occurred then?

A. We were in Gagnon's saloon and Dwinell said to me, 'Now, if you are ready, we will go down and fix up that business.'

Q. Go on and tell what occurred then?

A. We went down to his office, I believe Gagnon went with us. When we got down then they gave me $180.00, Gagnon's check for $180 and then we went back up to the saloon, Gagnon and I, and he gave me $20 in currency for my relinquishment."

13. The Court erred in overruling the defendants' objection to the question: "Did you ever hear Dr. Dwinell's reputation for truth, honesty and integrity questioned in regard to land matters?"

14. The Court erred in sustaining the objection to the questions propounded to the witness, David I. Mahoney, as follows:

"Q. Did you know John D. Gagnon in his lifetime? A. I did.

Q. Did you and he attend—

Mr. BLACK.—We object to that as absolutely immaterial and irrelevant. Mr. Gagnon is not on trial here.

The COURT.—The objection is sustained.

Mr. SCHLESINGER.—Will you permit me to finish the question and then take a ruling upon it?

The COURT.—Very well.

Mr. SCHLESINGER.—Q. Now, don't answer this, until the Court has ruled. Did you know the general reputation of John D. Gagon, for truth, honesty and integrity in the community in which he resides?

Mr. BLACK.—I object to that as immaterial, irrelevant and incompetent for any purpose connected with this case.

The COURT.—The objection will be sustained.

Mr. SCHLESINGER.—That is all, we take an exception."

15. The Court erred in making, giving and rendering judgment against the defendants for the reason that the said indictment does not state a crime or any offense against any law of the United States, and for the reasons taken and assigned by the defendant, George W. Dwinell in his demurrer to the said indictment and by defendants in their motion in arrest of judgment.

16. The Court erred in sentencing the defendants without their being first adjudged guilty of any crime.

17. The Court erred in pronouncing sentence of imprisonment against said defendants.

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Plaintiffs in Error and Defendants.

[Endorsed]: Filed Nov. 15, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,
Defendants.

Bill of Exceptions on Behalf of George W. Dwinnell and John Gilpin.

Be it remembered, that heretofore, the Grand Jury of the United States, in and for the Northern District of California, did find and return in, to and before the above-entitled Court its Indictment against the defendants George W. Dwinnell and John Gilpin, and thereafter the said George W. Dwinnell and John Gilpin appeared in said court, and upon being called to plead to said Indictment, filed and interposes their Demurrer to the same, thereupon and after argument of said Demurrer the said Court overruled the same and thereupon said defendants excepted to such ruling and said exception was allowed.

And be it further remembered that the said defendants having duly pleaded not guilty as shown by the record herein, and the cause being at issue, the same came on for trial, before the Honorable J. J. De Haven, District Judge, and a jury duly impaneled, the United States being represented by Alfred P. Black, Esq., and the defendants being represented by S. C. Denson, R. S. Taylor and Bert Schlesinger, Esqrs., the following proceedings were had:

[Testimony of Frederick M. French, for the United States.]

FREDERICK M. FRENCH, called as witness for the United States, being duly sworn, testified:

Mr. BLACK.—Q. Mr. French, where do you live?

(Testimony of Frederick M. French.)

A. I live in Siskiyou County, California.

Q. What is your full name?

A. Frederick Malcom French.

Q. Do you know the defendants Dwinnell, Gilpin & Deter? A. I do.

Q. I will ask you Mr. French, to talk so that all these gentlemen can hear you. How long have you known Dr. Dwinnell?

A. I have known Dr. Dwinnell about eight years.

Q. How long have you known Gilpin?

A. I think I have known Gilpin probably about six years.

Q. And Deter?

A. I never have known Rex Deter until about three years ago.

Q. Did you have any business with Dr. Dwinnell in the fall of 1906? A. Yes, sir.

Q. What was that business?

A. Well, the commencement of the business was cruising timber land.

Q. Just tell the jury from the start how you met the Doctor and what was done?

Mr. SCHLESINGER.—One moment. We object to any testimony as to any transaction or transactions other than those embraced in the indictment as immaterial and incompetent.

The COURT.—The objection will be overruled to that question.

Mr. BLACK.—Q. Just go on Mr. French and state.

(Testimony of Frederick M. French.)

A. Well, about the first as near as I can recollect with Dr. Dwinnell was I wanted him to get scrip for 40 acres that had a cave on it, and he spoke to me about some timber land they was going to open up and he asked me if I was a timberman, and I told him I was and he hired me to go up in the Butte Creek District and cruise a lot of timber, which I did.

Q. Before going further, what did he say about this land that was to be opened up?

A. Well, he said that there was a lot of land there that was in a temporary reservation, and that it was going to be opened up, and that he had a lot of timber up there and he wanted to get it all in together if he could and he would like to have people take it up so that he could get it in together, I went up there and cruised up a lot of timber and took a lot of people up there and showed them the timber.

Q. Who helped you to do that cruising and what did your work consist of in relation to that timber land?

A. Well, I had to go in and run the lines and estimate the timber and see what was on the ground.

Q. Who went with you, if any person, to assist in that work?

A. One of my boys was with me a little while, a few days; that is one, and also I had—

Q. Which one was that?

A. There was two at different times, one of them went to Butte Creek with me and one went out in

(Testimony of Frederick M. French.)

the Sheep Rock country with me about three days, I think.

Q. There were two of your own boys?

A. Yes, sir.

Q. That assisted you? A. Yes, sir.

Q. Did either one of the defendants assist in the work?

A. Mr. Rex Deter, came there and stopped at my house and went with me, and I run the lines and him and the boy done the chaining, and we did not find anything where Doctor Dwinnell sent us on that trip, we went by his orders but we went to Butte Creek and I think it was on section 14 in township 44 north 2 west Mr. Deter took a claim.

Q. Was that on the second trip?

A. That was on the second trip.

Q. During the time that you were running up the lines and cruising this timber land did any letter come to your notice from either of the defendants?

A. Well, yes; Dr. Dwinnell wrote us several letters, to me and also to my family. I have one letter in my pocket he wrote me in regard to timber.

Q. In regard to taking up land was any letter received by you or that came to your knowledge that you saw?

A. Well, yes, there was; he wrote letters to my boys and told them to go in—

Mr. SCHLESINGER.—One moment; we object to this, unless the letters are introduced or their absence accounted for.

The COURT.—Very well.

(Testimony of Frederick M. French.)

Mr. BLACK.—Q. What became of the letter that you had or the letters that you just referred to?

A. Well, I have one in my pocket.

Q. Does that refer to any portion of this land that was afterwards applied for at the Redding Land Office? A. I think it does.

Q. Will you let me see that letter?

A. Yes. I don't know just exactly where to find it, but it is in among my papers here. You can run right through them. Here it is (handing).

Q. Is this the letter that you refer to?

A. Well, that is one letter that I refer to, yes.

Q. Are you familiar with Dr. Dwinnell's handwriting?

A. Well, quite familiar; I have had quite a little dealings with him.

Q. Have you seen him write?

A. Yes, many times.

Q. Are you able to say that that is his?

A. Yes.

Mr. SCHLESINGER.—We admit that it is, I am familiar with the Doctor's handwriting.

Mr. BLACK.—This may be marked Exhibit 1 for the Government.

Mr. SCHLESINGER.—We object to it on the ground that it is wholly immaterial, irrelevant and incompetent, and in no wise responsive to any of the issues involved in this Indictment.

Mr. BLACK.—For the present I will ask that this be marked No. 1, for identification.

Mr. SCHLESINGER.—No objection to that.

(Testimony of Frederick M. French.)

Mr. BLACK.—I will refer to that later on.

Q. Now, before the 31st day of October, 1906, did any letter come either to you or to your boys that you had the reading of from Dr. Dwinnell?

A. Yes, sir.

Q. What became of that letter or those letters?

A. My wife burned them up.

Q. Do you know that of your own knowledge?

A. Yes.

Q. What was in those letters or any particular letter, if anything, in regard to the land?

A. Well—

Mr. SCHLESINGER.—One moment. I should like to cross-examine the witness as to the destruction of those letters before counsel proceeds further.

The COURT.—Very well.

Mr. SCHLESINGER.—Q. You say that you received prior to October 31, 1906, letters in the handwriting of Dr. Dwinnell, relating to the lands described in this Indictment?

A. Well, it was in regard to the lands, taking up lands in that vicinity that I was cruising.

Q. You read those letters? A. Yes.

Q. What did you do with them?

A. Well, I left them there at home, and one day my wife was looking over some letters and she took the letters and throwed them in the fire and said that she was afraid that Dr. Dwinnell would get me and her sons into trouble.

Q. When did you see her burn those letters, upon what date?

(Testimony of Frederick M. French.)

A. I could not tell you what date it was.

Q. What month?

A. Well, it was probably along in October; I couldn't say what month it was.

Q. You yourself saw her burn them?

A. I certainly did.

Q. Do you remember the year which they were burned?

A. Well, yes; it was along about the time of this timber steal, the time the timber steal was going on.

Q. Do you remember what time of the year?

A. Well, I think it was in October.

Q. You think it was in October? A. Yes.

Q. Do you recall the dates of those letters? Were they in the same month or different months?

A. Well, they were in the same month.

Q. What month were they in?

A. Well, they were in October, about the time that all of this timber was taken up and filed on.

Mr. SCHLESINGER.—That is all.

Mr. BLACK.—Q. I will ask you whether there was more than one letter that spoke in regard to the land?

A. There was one letter that came to the French Brothers; there was one letter that came to J. F. French.

Q. You saw both of those?

A. I saw the letters.

Q. You read them?

A. I read them but I could not make a statement

(Testimony of Frederick M. French.)

as to just exactly what it read, only it was in regard to this timber.

Q. Now, what did the letter that was addressed to the French Brothers say?

A. Well, it said—

Mr. VAN DUZER.—One moment. I appear for Mr. Deter. I wish to object to that on the ground that no evidence of this character can be introduced until there is some proof of the alleged conspiracy. Certainly that is the rule; the conspiracy must be established and the letter connected with it before any proof of this kind can be submitted before the jury. I make that objection.

The COURT.—The objection will be overruled.

Mr. VAN DUZER.—Exception.

Mr. SCHLESINGER.—It may be understood, so as to save time, that all objections made by one counsel shall go the benefit of all.

The COURT.—Very well.

Mr. BLACK.—Q. Read the question Mr. Reporter. (The Reporter reads the question.)

A. Well, as near as I can remember, it told them that there was a chance for them to go in and take up land and get a couple of hundred dollars apiece out of it.

Q. Did you go with any of those parties to locate any particular piece of land? A. Yes, sir.

Q. Whom did you accompany?

A. Well, I accompanied Rex Deter, Clarence Prather, my sons, Pete Gaverton and Ed. Luisner.

(Testimony of Frederick M. French.)

Q. When you say your sons, how many sons were there?

A. There were three of them; Frank and Fred and Samuel.

Q. Now, after having located the particular land for each of these that was to be applied for, what next was done?

A. Well, the next thing was to go to Redding, we started for Redding—I want to be certain,—I think it was about a week before the time for the land office to open in regard to this land, and I got into Montague and Dr. Dwinnell said he got on to another piece of ground on Butte Creek in town 44 north 1 east, I think that was it, and wanted me to go back and look it up; so I drove home; I got a livery team and drove home and took Frank French and drove up there in the night and looked the timber over, came back to Montague and went to Redding and got in there, I think it was, two days back of the other crowd.

Q. Now, at this time, Mr. French, how far did you live from Montague?

A. Why, I lived about, well somewhere from 9 to 12 miles.

Q. In the early morning whom did you accompany to Montague from your home?

A. Well, I accompanied, I won't be positive, I think there was Fred French, Sam French, Rex Deter and myself, I think.

Q. Did your boy Benjamin Franklin accompany you at that time? A. No, no.

(Testimony of Frederick M. French.)

Q. Where was he?

A. Well, he was at home.

Q. At home? A. Yes.

Q. After you had this conversation with Dr. Dwinnell about this other piece of land?

A. Yes, sir.

Q. You then got a livery rig and went out to your place and then what did you do?

A. I sent the rig back—well, I think Fred French went and drove us out, and took the rig back in time to catch the train for Redding, and then I took one of my own spans of horses and buggies and started for Butte Creek.

Q. Who did you take with you?

A. Frank French.

Q. Frank is the one that is called Benjamin Franklin? A. Yes.

Q. You call him Frank?

A. Yes. We went and looked at the land and came back—well, we drove the biggest part of two nights and came back and took the train and came in and joined the crowd, and when we got there—

Q. You joined the crowd at what point?

A. We joined the crowd, at Klinesmith's Hotel—I have forgotten.

Q. Klinesmith's Hotel in what place?

A. In Redding.

Q. Had your other boys who went with you to Montague already gone down to Redding?

A. They had gone down with Jack Gilpin, and they were all in one room so that if there was a tele-

gram come that they could be wakened up in time and make a rush for the land office door, because there were other parties that were expected there to take up land.

Q. Were you present at the time of the arrival of any telegram? A. Yes, sir.

Q. Who got that telegram? A. Mr. Gilpin.

Q. That is one of the defendants here?

A. Yes.

Q. What time of the day was it?

A. Well, I can't really recollect but I think it was early in the morning; I think it must have been about 4 or 5 o'clock in the morning.

Q. What was done then?

A. Well, they were all routed out and got down to the Land Office door.

Q. Which ones of your party went in line at that time?

A. Well, there was Frank French, and Benjamin F. and Sam and Fred and myself.

Q. How many people were in line ahead of you?

A. Well—

Mr. SCHLESINGER.—I object to that as immaterial and irrelevant.

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—Exception.

A. There were three—there were 3 or 5; I don't remember. There was Joe Herzog, the first man at the door, and there was Frank Richie, *Jacuet* and Mackey, I think, were ahead of our crowd.

Q. There was perhaps four anyway?

(Testimony of Frederick M. French.)

A. Yes, I think there were four or five.

Q. How long were you in line there in front of the Land Office?

A. Well, we were there two days and two nights and until 9 o'clock the next morning.

Q. What day was the land in question thrown open for application to purchase?

A. Well, I think it was the 31st.

Mr. BLACK.—Q. While in line there did you have any conversation with any of the defendants?

A. Oh, yes, quite a good deal. We of course talked and conversed with each other as we naturally would in that position.

Q. Did you have any special conversation with Dr. Dwinnell?

A. Well, yes, I had a conversation with Dr. Dwinnell quite a number of times while I was there.

Q. What did he say?

A. Well, I don't remember really what he did say.

Q. Did he give you any money? A. Yes.

Q. How much?

A. Well, I don't really remember; there was quite a little bunch of it. There was, oh, $60 or $70, I guess.

Q. What did he say to you, if anything, when he gave you the money?

A. He told me, he called me around in a little alley and he told me if any of the boys want any money to give it to them.

Q. Well, did you give any of them any money?

(Testimony of Frederick M. French.)

A. Yes.

Q. How much?

A. Well, I have forgotten the amount. I gave Prather money. Prather came to me and says, "Did Doc leave any money for us?" I says "Yes"—

Mr. SCHLESINGER.—One moment. I object to what Mr. Prather said to Mr. French and move it be stricken out.

The COURT.—Let it be stricken out.

Mr. BLACK.—Q. Well, you gave Prather a little money? A. Yes.

Q. Any of the others?

A. Yes, I gave Jaquet money; I gave Fred French money; I gave Sam French money; I gave B. F. French money, and Rex Deter money.

Q. Did you make any memorandum of the amounts?

A. Yes. I did not have my glasses and I could not see it very good and I took out my note-book and I calculated to settle with Mr. Dwinnell and I had each one sign his name and the amount that I gave him in his own handwriting.

Q. That was a page of your note-book, Mr. French? A. Yes.

Mr. SCHLESINGER.—Q. Have you that page?

Mr. BLACK.—I have it Mr. Schlesinger. At least I had it last evening.

Q. How many of the defendants were in Redding during the time that you were standing in line?

A. Well, they were all there with the exception

(Testimony of Frederick M. French.)

of—well, of course, Gagnon was not, that I saw, there.

Q. Was Deter in line? A. Yes.

Mr. VAN DUZER.—We desire it to be understood all this testimony is subject to the same objection that I made that it was immaterial, incompetent and irrelevant on the ground that no proof whatever has been offered to show or looking towards anything like a conspiracy between these defendants.

The COURT.—The objection will be overruled.

Mr. VAN DUZER.—Exception.

Mr. BLACK.—You cannot establish a conspiracy all at once.

Q. Now, on the morning of the 31st of October—I will have to refer to my memorandum later—did you appear before Mr. Leininger, the Register of the United States Land Office? A. Yes, sir.

Q. While you were standing or sitting in line, and before you got into the Land Office, did you have any conversation with Dr. Dwinnell in regard to your papers?

A. On account of the session that I had with him, he came in to me about thirty minutes before the doors of the Land Office were opened, and said,"I want to see your papers." He took hold of my coat, and took my papers out, and just a little bit before the doors opened he came and stuck, I supposed, the same papers back. My filings were in section 4 and 44 north, 2 west and when I came to go into the Land Office and lay my papers on the desk, they were made

(Testimony of Frederick M. French.)
out for section 12, and west half of the west half of section 12, in 45, 3 north.

Q. Now, who made out your original application, that is, the application for the land that you originally intended to take? A. Mr. Dwinnell.

Q. Were the papers that were presented to you, as you say, just before you got to the Land Office, also made out in his handwriting?

A. I could not say. I know he did a good many papers for Mr. Bickford. He took the papers and went into Mr. Bickford's office. I don't know whether they were made out in his handwriting.

Mr. VAN DUZER.—Q. Whose office was it that he went into? A. W. H. Bickford.

Mr. BLACK.—Q. I hand you Timber and Stone Lands Sworn statement in Duplicate, and ask you if those are the papers that were handed to you by Dr. Dwinnell a short time before you went into the Land Office at Redding on the 21st day of October, 1906, (handing)?

A. I should say it was.

Q. You swore to that before Mr. Leininger?

A. I think so.

Mr. BLACK.—We offer these papers in evidence.

Mr. SCHLESINGER.—Personally, we have no objection to the papers going in evidence.

Mr. VAN DUZER.—On behalf of my client, I object to their going in evidence on the ground that they are not the kind of papers that prove themselves, that is to say, an affidavit of this kind. It should be proved by the officer who took the affidavit.

(Testimony of Frederick M. French.)

It is not a character of paper which is an official document to the extent that it can be offered in evidence without proof of its execution. I object to it as irrelevant and immaterial and no proof of its execution. I have not had time to look at it. It purports to be a certain application signed by Mr. French. It is not evidence in itself. The execution must be proved by the Officer. It has no seal, and that character of paper is not evidence.

The COURT.—The objection is overruled.

Mr. VAN DUZER.—We will take an exception.

Mr. BLACK.—In as much as the third paper is pasted to this by the authorities in the Land Office, I want to examine as to the third paper attached, and offer the whole bunch as one Exhibit. I do not want to mangle the records. There are the official records of the Land Office.

Mr. SCHLESINGER.—We have no objection to its going in.

Mr. BLACK.—Without taking up time to read this at the present time, we will consider it read.

Mr. SCHLESINGER.—Yes.

Mr. BLACK.—And we ask that this be marked Government's Exhibit No. 1.

Q. Now, Mr. French, at the time of your swearing to that paper, did you have any agreement or understanding with Dr. Dwinnell, or any other of the defendants in regard to the price that you were going to get for making that application.

Mr. BLACK.—Q. Did you have any agreement or understanding with any of the defendants?

(Testimony of Frederick M. French.)

A. I had an understanding that I was to get $200 if I would relinquish the timber.

Q. With whom was that understanding?

A. Mr. Dwinnell.

Q. Where and when was it made?

A. Well, it was made about the time or a little before the time of the filing.

Q. Where were you when you had this conversation?

A. I was in his office at Montague.

Q. Give the particulars of that understanding?

A. As near as I can give the particulars, he said that he had a lot of timber open in the Butte Creek country and he wanted to get in all of his timber that he could so that he could make one sale of the whole thing, that he could sell it to better advantage, and he wanted to get people to file on it in order to put scrip on it, or somebody would be ahead. And another thing that I inquired of him, if I lost my timber rights by relinquishing my claim to him. He said I did not. He said, "If you take a claim and relinquish to me, it does not bar your timber rights in the least. You can go right ahead and make your timber filings just the same."

Q. When was it that he told you he would give you $200 if you would make the application and then relinquish to him?

A. He said that about the time that I went up there to cruise the timber, somewhere in the neighborhood, about the time that he went down, between that and the time that we went to make the filing.

(Testimony of Frederick M. French.)

Q. This affidavit which is made in duplicate contains the following language, "That I have made no other Application under said Acts, that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire, from the Government of the United States may inure in whole or in part to the benefit of any person except myself, and that my postoffice address is Montague." Was that language true or false?

A. Was it true or false?

Q. Yes.

A. I don't really understand that, but everything that we did was under the advisement and direction of Dr. Dwinnell.

Mr. SCHLESINGER.—I move to strike that out as not responsive to the question.

The COURT.—Let the answer remain.

Mr. SCHLESINGER.—We will take an exception.

Mr. BLACK.—Q. When you swore to that, Mr. French, did you know it was not true?

A. He told us that we were taking it for—

Q. Answer the question.

The COURT.—Q. Cannot you answer the question. You made that affidavit. He asked you whether, when you made it, you believed it to be true or not. Whether it was true or not.

(Testimony of Frederick M. French.)

A. In one sense of the word, I did not believe it was true.

Mr. BLACK.—At the time you made that affidavit, did you know that you had this agreement or contract or understanding with Dr. Dwinnell, that you were to make a relinquishment to him for $200?

A. Yes, sir.

Mr. VAN DUZER.—The paper shows for itself.

Mr. SCHLESINGER.—The witness answers without giving us time to object. It is in there now, so let it remain.

Mr. BLACK.—Q. On the 24th of November, did you have an understanding or arrangement with Dr. Dwinnell, as evidence by that paper which I hand you which purports to be a relinquishment, referring to Government Exhibit 1? A. Yes, sir.

Q. What is that?

A. That is, I think a relinquishment.

Q. Where was that made out?

A. I think that was made out in Dr. Dwinnell's office.

Q. In whose handwriting is that, if you know?

A. I should say in Dr. Dwinnell's.

Q. You signed it, and it is witnessed by Dr. Dwinnell?

A. Yes, sir, there was so much of it that transpired that I cannot recollect at all.

Q. After you had signed this paper which was witnessed by Dr. Dwinnell, did you receive any money from Dr. Dwinnell?

(Testimony of Frederick M. French.)

A. Yes, sir, I believe I got a check for $200 on the Yreka Bank.

Q. Who gave you that check?

A. Mr. Dwinnell.

Q. Did you have any conversation with Dr. Dwinnell in regard to obtaining relinquishments from any of your sons?

Mr. SCHLESINGER.—I object to that unless the time is fixed, as time is of all importance in this transaction. If he had the talk prior to the locations, it is perfectly proper. If he had it subsequent to the locations, the Government might make some other claim. We object, unless the time and place are fixed.

The COURT.—Fix the time.

Mr. BLACK.—Q. The conversations would be after the 31st day of October, and between that and the 1st day of December, 1906.

Mr. SCHLESINGER.—That is not sufficient, unless it is an agreement made prior to the locations.

Mr. BLACK.—I do not understand that that is the rule. Anything that any conspirator says or does at any time that has relation to the original scheme as against that conspirator is pertinent and competent testimony. That is my understanding of the rule. It is not anything that occurs after the consummation. It does not bind anyone except the individual who makes the statement, or does the act, but as to him, I think it is entirely competent.

The COURT.—The objection will be overruled.

(Testimony of Frederick M. French.)

Mr. SCHLESINGER.—We take an exception.

(A recess is here taken until 2 P. M.)

* * * * * * * * *

[Testimony of Frederick M. French for the United States—Recalled.]

FREDERICK M. FRENCH, recalled—Direct examination resumed.

Mr. BLACK.—Now you may answer the question, Mr. French.

A. What was the question?

Q. Read the question, Mr. Reporter.

(The reporter reads the question as follows: Did you have any conversation with Dr. Dwinnell in regard to obtaining relinquishments from any of your sons?)

A. Well, yes, there was a talk between the Doctor and I in regard to relinquishments.

Q. What was said and what was done in regard to those?

A. I cannot hardly remember what was said only that the doctor wanted them to relinquish, and after they had made their filing some of them did not want to relinquish, but I did everything that I could to get them to relinquish.

Q. Were any papers or relinquishments given to you to obtain your boys' signature to?

A. Well, yes, there was.

Q. Which ones were those, do you remember?

Mr. SCHLESINGER.—We object to that unless

(Testimony of Frederick M. French.)

the papers themselves are produced, if you have them, if not, account for their absence.

Mr. BLACK.—I think I can produce them.

Q. Take, for instance, the application, and the so-called relinquishment attached to that of Samuel L. French, application 4818. Look at the written document, and also a blank that is filled in, and I will ask you if that is one of the relinquishments that one of your sons made (handing)?

Mr. SCHLESINGER.—I do not want to be captious, if your Honor please, but it seems to me that the best evidence would be the testimony of the son himself.

The COURT.—If this witness knows anything about it, he can state it.

Mr. SCHLESINGER.—I do not see how he can know.

A. There is my name attached to it, and that is the paper.

Mr. BLACK.—I ask that that be marked Government Exhibit 2 for identification.

Q. Take the application of Benjamin Franklin French, No. 4817, I ask you to look at the relinquishment attached to that application, and state whether or not you were one of the witnesses (handing)?

A. Yes, sir.

Q. Do you remember where that relinquishment was witnessed, where you were?

A. I think I was in Dr. Dwinnell's office.

Q. And who were present at the time?

(Testimony of Frederick M. French.)

A. I don't remember as anybody was, with the exception of Benjamin Franklin.

Q. Besides whom?

A. Besides Benjamin Franklin French, there was just Dr. Dwinnell and myself. I will not be certain. I could not say.

Q. That is your recollection? A. Yes, sir.

Q. I ask you to look at the application of James F. French, No. 4820, and state whether you witnessed that relinquishment (handing)?

A. No, sir, I did not witness that relinquishment.

Q. That is Benjamin Franklin. I will withdraw that last question, and confine it to No. 4817, so far as this witness is concerned. On the occasion of the signing of either of these relinquishments, was any money given to you to hand to any of your boys?

A. Well, yes, he gave me $200 to give to Frank, and I went out to Mr. Cash's and gave to him.

Q. Who gave you the $200?

A. Mr. Dwinnell.

Q. Now, which one is Frank, what is his full name? A. Benjamin.

Q. Benjamin Franklin? A. Yes, sir.

Q. Now, recurring for a moment, Mr. French, to the page in your memorandum-book that you referred to this morning, I hand you a paper containing the figures 173 in printing, the upper right-hand corner, marked Exhibit "A," and ask you if that is the memorandum that you referred to this morning (handing)? A. Yes, sir.

(Testimony of Frederick M. French.)

Q. Is that the original paper or memorandum that was kept by you at the time that you were in line before the Register's Office? A. Yes, sir.

Q. How many people wrote their names on that page?

A. There were three. There was Jaquette and Prather and Deter.

Q. The other writing is your memorandum, is it?

A. I rather think the other writing is mine.

Q. How much money was paid to Mr. Prather?

Mr. SCHLESINGER.—I object to that as immaterial, incompetent and irrelevant, and in no wise binding on the defendant.

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—We will take an exception.

A. $15 was paid to Prather,—let me see. There was $5, I think paid to him.

Mr. BLACK.—Q. Can you run your eye across the line—

The COURT.—Does not the paper show for itself?

Mr. BLACK.—Yes.

The COURT.—Let it go at that.

Mr. BLACK.—I offer the paper in evidence.

Mr. SCHLESINGER.—The only objection we have to this document going in evidence is, that it bears no date. It is not shown to have been made in pursuance of the alleged conspiracy set out in the Indictment. It does not appear when it was made, whether before or after the making of the locations.

(Testimony of Frederick M. French.)

Mr. BLACK.—The witness has cured that. He says it was made while they were in line, and before they got into the Land Office.

Mr. SCHLESINGER.—And further, it can only be used to refresh the memory of the witness, and not as evidence of any independent fact.

The COURT.—If you want to insist on a technical objection like that, let the witness read it off. If the witness says that paper shows the names of the persons, and the amounts of money he paid while they were standing in line, the paper becomes a part of his testimony. This a compact form and it may as well be used as to have him read it off.

Mr. SCHLESINGER.—It is a private memorandum and can only be used to refresh his memory, and not used against the defendants.

The COURT.—The objection is overruled. I will let him state in general terms what that paper is.

Mr. SCHLESINGER.—We will take an exception.

Mr. BLACK.—Q. Will you just take that—

The COURT.—Ask him the direct question.

Mr. BLACK.—Q. Just take that paper, and state what moneys you paid, and to whom you paid it on that occasion?

A. I paid Frank French, I think $10, and A. Jaquette, $15; Prather $5,—hold on. R. F. Deter—it is his own handwriting $5; and Clarence Prather $10. Fred French, that is my oldest son, $5, Frank French, $3; Samuel French, $2, and the balance of the account was what was used. Dr. Dwinnell told

(Testimony of Frederick M. French.)

me to use the money for anything they needed to eat, and I paid out the balance. I cannot see what the amount is, but I think it is specified there.

Q. Your sight is not the best?

A. It is not very good.

The COURT.—This case will never turn on the question whether he paid $175, or whether he paid $1.50, or whether he paid anything at all. There is no need of going into these minute particulars. The jury cannot keep them in their minds and they do not prove anything when you get it before them.

Mr. BLACK.—One of the defendants is stated by the witness to have personally receipted for that himself. As against the defendant Deter, I offer this paper in evidence.

Mr. SCHLESINGER.—We object to it on the grounds heretofore urged.

The COURT.—I overrule the objection.

Mr. SCHLESINGER.—We will take an exception.

Mr. BLACK.—I offer it as Government's Exhibit 2.

(Government's Exhibit No. 2 is in the words and figures, to wit:)

[Government's Exhibit No. 2.]

173.

Exhibit "A"—Dwinnell.

Frank French	$10.00
A. Jaquette	15.00
R. F. Deter	5.00
C. M. Prather	10.00

(Testimony of Frederick M. French.)

Fred French	5.00
Frank French	3.00
Sam French	2.00
Jury Box refreshments	5.60
Julians Feed and Livery	7.50
Fare from Reding	3.40

[Endorsement]: No. 4630. U. S. vs. Dwinnell et al. U. S. Exhibit No. (2). Jas. P. Brown. By Francis Krull, Deputy Clerk.

(REVERSE SIDE.)

174.

A. S. Calkins,
W. ½ W. ½ 12745.3
Robt. Nixon,
Journal, Yreka, Cal.

J. E. Booth,
Franco Hotel, Yreka.

Riley Smith,
The Lincoln Hotel, corner up 11 and Mission St.

---

s—

Mr. BLACK.—Q. Did you have any conversation, Mr. French, with any of the defendants in regard to the change of the land that was in the application that you actually made in the Land Office, and the one that you intended to make when you first went into line? A. No, sir.

(Testimony of Frederick M. French.)

Q. Did you have any conversation with Dr. Dwinnell in regard to that land?

A. No, sir, not in regard to the change of the numbers of the land.

Q. Not with any of the defendants?

A. No, sir.

Q. Did you have any conversation with Dr. Dwinnell after returning from Redding after the filings had been made in regard to the best method to follow in relation to the relinquishment of the land?

Mr. SCHLESINGER.—I object to that as immaterial, incompetent and irrelevant, and not as of the time prior to the making of the locations, and not binding on any of the other codefendants.

The COURT.—It certainly is not binding on any of the other codefendants. It may be received in evidence against the defendant Deter.

Mr. SCHLESINGER.—We will take an exception.

The COURT.—It is a matter of no great importance any way, one way or the other. Whatever it may be worth, it is evidence against Deter.

Mr. SCHLESINGER.—Very well.

A. I don't remember.

Mr. BLACK.—Q. I will ask you a direct question, to refresh your memory. Did the doctor say to you that the best way to do would be to have the boys relinquish and he would file scrip on it in their names?

Mr. SCHLESINGER.—We object to that as being decidedly leading. The witness has not sug-

(Testimony of Frederick M. French.)
gested that his memory needs in anywise refreshing.

The COURT.—The objection is overruled. On anything that is so immaterial as that, the quicker you get it out, and get through with it, the better.

Mr. SCHLESINGER.—Very well. We will withdraw the objection.

A. Well, yes.

Q. What did he say?

A. There was talk in regard to scripping it, and in regard to proving up on it, but I cannot tell just what it was.

Cross-examination.

Mr. TAYLOR.—Q. You knew something about timber cruising prior to the time you have just testified to? A. Prior to the time.

Q. Yes.

A. Yes, sir. I never cruised any in this country.

Q. You had cruised before?

A. Yes, sir; in an eastern country.

Q. You located people on land as a cruiser?

A. No, sir.

Q. Never have? A. No, sir.

Q. You knew something about surveying?

A. Yes, sir.

Q. Dr. Dwinnell hired you because you had a knowledge of timber? A. I think he did.

Q. And hired you to do what?

A. Hired me to do what?

Q. Yes.

A. He hired me to go up and cruise the timber and those people took up before this land squabble at Redding.

(Testimony of Frederick M. French.)

Q. He did not hire you to cruise specific sections?

A. Certain sections.

Q. Certain quarter sections?

A. He told me to go in there and *loon* up that timber and estimate it, and see what it was. There were some pieces that was not anything on it. Other pieces were good. Those pieces were picked out.

Q. He wanted the information of what land was to be opened for entry had good timber on it, and what did not? A. Yes, sir; certainly.

Q. He employed you to do that because of your knowledge?

A. He employed me to do that, yes.

Q. At that time, did he make any trade with you, any suggestion to you? A. Yes, sir.

Q. What did he say?

A. He told me that he wanted me to go up and cruise that timber, and then take men that he sent to me up there, and show them the land, which I did.

Q. Was anything said about relinquishment?

A. Not as I know of just at that personal time.

Q. Did you talk about it?

A. No, sir; I know there was talk of relinquishment afterwards, or about that time.

Q. To you?

A. To me, that is, after they had started to put people on it, where it was surveyed.

Q. Then you make a report to Dr. Dwinnell, of what had good timber on, and what had not?

A. Certainly I did.

Q. Then did he ask you to take it up?

(Testimony of Frederick M. French.)

A. He asked me to take some of it up.

Q. What part of it?

A. He asked me to take up—He wanted me to take up any one piece. It did not make no difference what piece it was.

Q. What did he say about it?

A. He said if I would take up a piece he would pay me for it.

Q. Pay you for what?

A. For taking up the timber.

Q. For taking it up and relinquishing it?

A. For taking it up and relinquishing it, both.

Q. Is that what he said?

A. He said he had a lot of timber through that country, and that he wanted to get all of this timber together as much in a body as he could.

Q. Was that the trade you made with Dr. Dwinnell?

A. Not particularly, no. There was a lot of trading done.

Q. What trading was it? Give me the rest of it.

A. Dr. Dwinnell sent my boys with me. He sent Deter and he sent others to show them this land.

Q. Did Dr. Dwinnell talk with your boys, and send them with you? A. He certainly did.

Q. He talked with them?

A. He talked with them.

Q. When? A. At different times.

Q. Give us the first time, and the first boy?

A. I don't know that I could, just the first time,

(Testimony of Frederick M. French.)

and the spot and the place. The first he wrote out, my oldest boy—

Q. I do not care about the writing out, but the conversation when you were present?

A. I don't know as I could give you any conversation.

Q. What was said and which boy was it?

A. I can tell you what he said to one of the boys.

Q. Which boy? A. To Sam.

Q. What did he say?

A. Sam asked him in particular—He sent out for the boy, and the boy came in to see him. Says he, "Have I the right to take this timber and relinquish to you"? Dr. Dwinnell says, "Yes, you have a perfect right to do it."

Q. When was that?

A. Just before they made the filing. The boy says, "Now, if I have a perfect right to do it, I will do it." The Doctor says, "You have." The boy says, "If I make a filing and relinquish to you, will I lose my timber rights"? "No," the Doctor says, "You do not; it will not bar you from going ahead and taking another timber claim, and proving up on it."

Q. Did he have any other conversation with that boy in your presence?

A. I could not say whether he did or not.

Q. What did the boy say—he would go and take it up? A. He certainly did.

Q. Did he have a conversation in your presence with any of the other boys?

(Testimony of Frederick M. French.)

A. He kept me around there—

Q. No, the question is, did he have a conversation with any other of your sons in your presence?

A. I could not say.

Q. Then you do not know?

A. I know I was with the boys, but I could not tell what was said. It has been a long time ago.

Q. Can you tell us when you were there with either of the other boys?

A. Yes, sir; I was there with Fred.

Q. What did he say to Fred?

A. I don't recollect just what he did say.

Q. Cannot you tell this jury what he said?

A. I could, if I could recollect what he said. That was a conversation three years ago, and I have forgotten it, I cannot repeat what was said.

Q. Then you cannot tell. Any of the other boys in your presence that had any talk with Dr. Dwinnell? A. I think they did.

Q. Which one? A. Frank.

Q. When was that?

A. That was in Dr. Dwinnell's office, I cannot tell. I cannot recall the time exactly.

Q. In October or November?

A. Probably in October.

Q. Probably? A. Yes, sir.

Q. Don't you know if it was or not?

A. It must have been in November, because it was after the filing.

Q. In November? A. Yes, sir.

(Testimony of Frederick M. French.)

Q. It was in November that he had the talk with the last boy? A. Yes, sir.

Q. What did he say to him?

A. I don't remember, I tell you, what he did say. I cannot remember everything that was said there.

Q. Now, Mr. French, you took an affidavit before the Land Office? A. What is that?

Q. You took a sworn statement in the Land Office? You signed it and swore to it?

A. Yes, sir; I did.

Q. Did you not know you were committing perjury when you did it?

A. I knew that I was committing perjury in this way. Dr. Dwinnell told me that it was just a matter or form to relinquish, and when it was relinquished, that was the end of it, and it does not cut no figure with any of us. It was all straight, and all right.

Q. You knew, though, you were committing perjury; yes or no? A. Yes, sir.

Q. You talked with your boys about going down there, and making that filing?

A. I certainly did.

Q. Did you tell your boys that it would be committing perjury?

A. No, sir; I did not tell them so.

Q. You did not tell them?

A. No, sir; I did not look at it as perjury.

Q. You did not look at it as perjury?

A. No, sir.

(Testimony of Frederick M. French.)

Q. Don't you mean to tell the jury that you knew when you were taking that oath, you were wilfully taking a false oath?

A. I knew when a man takes an oath and it is not true, it is perjury, but Dr. Dwinnell told us it was just a matter of form and when that relinquishment was made, that was the end of it, and he did not look at it as perjury; he said he did not have none of us commit ourselves to perjury or anything.

Q. The question is, did you now know you were wilfully taking a false oath when you did it?

A. I have told you right here just as near the truth as I can.

Mr. BLACK.—I object to that as the question has been answered already.

The COURT.—It has been answered.

Mr. TAYLOR.—Q. Have you been on friendly terms with Dr. Dwinnell?

A. I was on friendly terms with Dr. Dwinnell, until Dr. Dwinnell told me falsehoods, then I went back on him, and have never been friendly with him since.

Q. What is the date when your friendship with him ceased?

A. I will tell you. The date would date up to a little after those claims were relinquished. I went to Yreka—

The COURT.—Q. You need not go further than that. You were not on friendly terms with him?

A. No, sir.

The COURT.—That answers the question.

(Testimony of Frederick M. French.)

Mr. TAYLOR.—Is it not a fact that you have taken a great interest in this prosecution?

A. I have not taken any more interest than I should have taken.

Q. Is it not a fact you went with the Government agent, Mr. Christensen, gave him your affidavit, had the affidavits of each one of your sons taken—

A. Mr. Christensen?

Q. Yes. A. No, sir.

Q. Did you go with the Government Agent?

A. Yes, sir.

Q. Which one?

A. I went with Mr. Fellows.

Q. Did you not go with Mr. Jaquette, to get his affidavit?

A. I did not go with him to get his affidavit. Mr. Jaquette was on the road, and I told him where Mr. Fellows was.

Q. Did you go with him? A. Yes, sir.

Q. Did you go with him to get Mr. Prather's affidavit? A. No, sir; I never did.

Q. You never did? A. No, sir.

Q. Is it not a fact that you have been very bitter against Dr. Dwinnell ever since 1907, and that you have threatened to take his life?

A. I never have, but I have been bitter against Dr. Dwinnell, but I am the last man that would spill a drop of human blood on the face of God Almighty's earth. I never threatened his life.

Q. Do you know H. H. Hudson, of Montague?

A. Yes, sir.

(Testimony of Frederick M. French.)

Q. In his store at Montague, did you not tell him you were going down to your house to get your gun to kill Dr. Dwinnell?

A. I never told H. H. Hudson such a thing, he or any other man.

Q. In the summer of 1907, in a team driving from Montague to Butte Creek, with Mr. Lucas present, and Mr. Gilpin, one of the defendants, did you not say to him in that presence, and at that time, that if you ever caught the doctor in the timber you would kill him like you would a coyote?

A. I never said any such thing. Who was with Gilpin?

Q. Yourself and Mr. Lucas.

A. Just Lucas and me. Was Gilpin along?

Q. Yes.

A. I don't think Gilpin has ever spoken to me since this transaction came up, since this bitter feeling between us over this timber matter has existed.

Q. Did you not go out with him to Butte Creek to show him a Forty out there? A. Gilpin?

Q. Yes.

A. Never in God's world. I never went with Gilpin to look at a piece of timber in my life, only in Scott's Valley.

Q. In Montague, on the bench, in February, 1906, in front of John Gagnon's saloon, did you not say to E. K. Looseley, when the Doctor was passing, "There goes the son-of-a-bitch; I will put him in the penitentiary even though I had to go there the balance of my life"?

A. No, sir; I never told him so.

(Testimony of Frederick M. French.)

Q. You did not make that statement?

A. No, sir.

Q. Or words substantially to that effect?

A. No, sir.

Q. At Montague, on or about September 8th, 1907, at the same place, Gagnon's saloon, did you not state to Rex Deter, one of the defendants here, that he, Deter, would have a chance to come up before the United States Court, and tell what he knew about the timber business, and he asked you what timber, and you told him the timber business your boys took up, and you said, "There goes the doctor, the old son-of-a-bitch had done us up, and I will see him in the penitentiary if it costs me the rest of my life"; did you say that? A. I never said it.

Q. You never made any threats against Dr. Dwinnell?

The COURT.—I think this has gone far enough. There is no necessity in going all over these minor matters. You have asked him in relation to about a dozen of these expressions.

Mr. TAYLOR.—With different parties.

The COURT.—The witness has stated over and over again, he is not on friendly terms with Dr. Dwinnell. That is sufficient for general purposes to enable the jury to determine whether his testimony is affected by any such feeling. There is no need to go into all these minute matters.

Mr. TAYLOR.—Q. I hand the witness what purports to be a letter in his handwriting signed by him-

(Testimony of Frederick M. French.)
self, written from Sacramento, and directed to Dr. Dwinnell, at Montague (handing)?

A. Yes, sir; that is my handwriting.

Q. You wrote that letter?

A. I wrote that letter, if it has not been counterfeited. I would just as soon have it read to the Court and to the jury as not.

Q. Did you mail that from Sacramento to Dr. Dwinnell?

A. Yes, sir; I mailed that from Sacramento to Dr. Dwinnell.

Mr. TAYLOR.—I will offer the letter in evidence. (Reading:)

"Sacramento, Aug. 19-1908.

"G. W. Dwinnell. You wright the rong you did me. You have caused a cloud to arise between my wife and I that will never clear away; as I live with my sons as a stranger, and it is caused by you. You told us we could make a second timber filing. You knew you lied at the time, but I had confidence in you, and advise them in your favor, as I knew nothing of the law at that time. You go to Mrs. French and those boys and fix for every claim, or I will send some parties there to settle with you.

F. M. FRENCH."

(The letter is marked Defendant's Exhibit 1.)

A. Yes, sir; I wrote that, and sent it to him, and I went to Mr.—

The COURT.—That is sufficient.

Mr. TAYLOR.—Q. That was after you had received—

(Testimony of Frederick M. French.)

The COURT.—I really do not see the necessity of going into this collateral matter to such an extent. You have got the facts here of the bitter feeling between them, and you have got the statement in writing. Why are you not satisfied with that?

Mr. TAYLOR.—I want to ask the witness a question.

The COURT.—You cannot try a case that way. The jury will forget all about the case. They will think they are trying some other case.

Mr. TAYLOR.—Counsel have some idea of putting in their case.

The COURT.—I do not think you have the correct idea. If that is your idea of trying the case, it is not mine.

Mr. TAYLOR.—Unfortunately I have to attend to my client's case as best I can.

Q. Do I understand you that at Redding, Dr. Dwinnell, when you had a filing ready in your pocket for one piece of land, standing in line, came up and took that from you and changed it, and put in another filing on another piece of land?

A. Yes, sir.

Q. Who was present?

A. Everybody that sat in the room was present.

Q. Was John Dowling there?

A. I think he had something to do with it. I asked him what it was done for. He said to get me a better claim. That is the explanation he gave me.

Q. Was that piece of land to be taken by a man by the name of Willis?

(Testimony of Frederick M. French.)

A. Who was to put Willis on to it.

Q. Did you not yourself want to make the exchange with Willis, and take one piece of land, and let Willis take yours?

A. I never spoke to Willis in my life until after that transaction. I did not know Willis.

Q. Did you know the land that was described after the paper was changed that you finally filed on?

A. Yes, sir, I knew the land. Mr. Willis and I never had spoken or knew each other until after it was changed.

Q. Have you told the jury practically all the contracts you had with Dr. Dwinnell?

A. No, sir; I have not.

Q. Tell us all.

A. No, sir; I cannot tell you all. I could not do it, if it was to take me a week. There is lots of it that I have forgotten.

Q. Have you told us all of the contracts you can think of?

A. There was one contract that John Dowling sent to me in John Gagnon's saloon, that I signed. The agreement was made between Dr. Dwinnell—

Mr. BLACK.—Q. Is this in reference to any of the applications here? A. No, sir.

Mr. BLACK.—I object to it as irrelevant, immaterial and not cross-examination.

Mr. TAYLOR.—I have not asked for those, but for those here.

The COURT.—The witness misunderstood you. He is talking about something else.

(Testimony of Frederick M. French.)

Mr. TAYLOR.—Q. And you told the jury about all the contracts that you can remember you had with Dr. Dwinnell about these lands?

A. I think I have. I don't know really.

Q. You do not have in mind now any other contracts? A. No, sir.

Q. Now, Mr. French, is it not a fact that you went down there to file, to take up those lands for yourself, and is it not a fact that you went to Mr. H. H. Hudson, some time in November after the filing, to borrow money for yourself and sons to pay out in your final proof?

A. I never went to him to borrow one dollar, and I can prove I have money to pay on all of those claims at that time.

Q. Mr. H. H. Hudson, and in the merchandise store of Mr. Cornelius, the merchandise dealer at Montague?

A. I don't think Mr. Cornelius will swear to anything of the kind.

Q. Do you know Mr. H. H. Hudson?

A. Very well.

Q. Do you know Mr. R. P. Cornelius?

A. Yes, sir.

Q. Did you not, afterwards, failing to get the money there, go to Dr. Dwinnell, and ask him to go and get some parties who would lend you money to make your final proof?

A. I never did, but Mr. Dwinnell went to Mr. Eddy, and Mr. Dwinnell said that it would be best, it would look better to have somebody else furnish

(Testimony of Frederick M. French.)
the money and put it up, when he was talking about having us prove up on the land, so I understand by him that he went to Mr. Eddy, to get the money, but as for my going to borrow one dollar to prove up on the land, I never done it.

Q. Then you never intended to take up that land on that title for yourself?

A. I was taking it up for Dr. Dwinnell.

Q. Were you ever intending to perfect that title. I want an answer to that, yes or no?

A. If the title had been perfected the land was to be turned over to Dr. Dwinnell.

Q. That is not the question. The question is, did you ever intend yourself, to take up that title that you had initiated there?

A. You see, it is just this way. The bargain was made that Dwinnell was to get that land. It did not matter whether it was proved up, or relinquished on, or scrip.

Mr. TAYLOR.—I ask to have that stricken out as not responsive.

The COURT.—Let it remain.

Mr. TAYLOR.—That is all.

Mr. BLACK.—Out of order, I desire to call Mr. Kingsbury, the Surveyor General.

[Testimony of Mr. Kingsbury, for the United States.]

Mr. KINGSBURY, called as witness for the United States, being duly sworn, testified:

Mr. BLACK.—Q. Mr. Kingsbury, I will ask you to state if you had an application No. 4631, for the

(Testimony of Mr. Kingsbury.)

purchase of the southwest quarter of Section 34, Township 45 North, Range 3 West, the land embraced in the Timber and Stone Entry of Arthur W. Jaquette, filed in your office?

A. I had application 4631, filed by John Gilpin.

Q. Give what your record shows in regard to application 4631?

A. It shows that John Gilpin was the applicant. The application was filed November 26, 1906. The filing receipt was sent to G. W. Dwinnell, Montague, California. The application was approved June 3, 1907. The approval was sent to G. W. Dwinnell, Montague. The Certificate of purchase was issued June 29, 1907, and was forwarded to G. W. Dwinnell, at Montague.

Mr. SCHLESINGER.—Q. The Certificate was issued to whom?

A. The Certificate was issued to Mr. Gilpin, and the approval to Mr. Gilpin, and the Certificate of purchase to Mr. Gilpin.

Mr. BLACK.—I offer that application 4631 in evidence as Government's Exhibit 3.

Mr. SCHLESINGER.—I have no objection to that.

Mr. BLACK.—It may be considered read.

Mr. SCHLESINGER.—Yes, we will waive the reading at the present time. I just want to ask one question of the witness.

Q. You have no other papers relating to this application, have you?

A. Only the books, no others.

(Testimony of Mr. Kingsbury.)

Q. These are the original documents and all of them?

A. Yes, sir, with the exception of the notes made in the books.

* * * * * * * * *

Mr. BLACK.—Q. Take application No. 4632, embracing the west half of the Northwest quarter of the west half of the Southwest quarter of Section 12, Township 45 North, 3 West, of Timber & Stone application 4819 of Frederick M. French, and tell us what your record shows in regard to that?

A. The record shows that application 4632 for the land described by you was filed by C. M. Dowling, November 28th, 1906. The filing receipt was sent to M. F. Reilly, in San Francisco. The application was approved June 3d, 1907, and the approval was sent to Eugene Dowling at Yreka. The certificate of purchase was issued July 22d, 1907, and was sent to *D.* W. Dwinnell at Montague.

Mr. SCHLESINGER.—Q. Whose certificate was that?

A. It runs to C. M. Dowling.

Mr. BLACK.—We offer that as Government's Exhibit No. 4.

Mr. SCHLESINGER.—We have no objection to it. I will just glance over it hurriedly.

The COURT.—Those applications are all in the same form?

(Testimony of Mr. Kingsbury.)

Mr. SCHLESINGER.—Yes, they seem to be in the usual form. We will waive the reading.

* * * * * * * * *

Mr. BLACK.—Q. No. 4629, embracing lots 1 and 2 southwest quarter of the northeast quarter of the northwest quarter of the southeast quarter of Section—,Township 43 North, 1 West, the application of Benjamin Franklin French. The south half of the northeast quarter, the south half of the southeast quarter of Section 8—perhaps I am taking up the time unnecessarily. I think each of these applications shows the description. I am simply embracing the land taken up by Benjamin Franklin French, Samuel French, James F. French, Clarence M. Prather, and asked you to state the history of that as shown by your records.

Mr. SCHLESINGER.—Take them in the order in which Mr. Black enumerated them.

Mr. BLACK.—Q. It is all one application, 4629.

A. The application is No. 4629, and is filed by J. D. Gagnon, filed November 26th, 1906. The filing receipt was sent to G. W. Dwinnell, Montague. The application was cancelled for failure of applicant to supply the affidavits of two witnesses. That completes the history so far as my office is concerned regarding this application.

Mr. BLACK.—We offer that as Government's Exhibit No. 5 and will consider it read.

Mr. SCHLESINGER.—Yes.

(Testimony of Mr. Kingsbury.)

Q. All of your papers show, do they not, that in this last application, Mr. Gagnon remained the purchaser?

A. He presented the application, but he did acquire the land from the State. The application was cancelled.

Q. He was the applicant for purchase?

A. Yes, sir.

Q. Your records show that all the way through?

A. Yes, sir.

Mr. SCHLESINGER.—We have no objection to this.

* * * * * * * * *

Cross-examination.

Mr. SCHLESINGER.—Q. As far as your records show, the applicants for purchase remained the same all the way through, did they not?

A. Yes, sir, that is the certificate of purchase went to the men that filed the application.

Q. That is in none of these cases was the applicant for the title G. W. Dwinnell?

A. No, sir.

[Testimony of Clarence M. Prather, for the United States.]

CLARENCE M. PRATHER, called as a witness for the United States, being duly sworn, testified:

Mr. BLACK.—Q. Your name is Clarence M. Prather? A. Yes, sir.

(Testimony of Clarence M. Prather.)

Q. Where do you live?

A. Siskiyou County, near Montague.

Q. How long have you lived there?

A. Since 1883.

Q. Do you know Dr. Dwinnell?

A. Yes, sir.

Q. Do you know Rex Deter? A. Yes, sir.

Q. Do you know John Gilpin? A. Yes, sir.

Q. How long have you known them?

A. Quite a number of years. I don't know exactly how long.

Q. On friendly relations with all of them?

A. Yes, sir.

Q. Did you go with any of the French's to make a selection of land for the purpose of making an application to purchase? A. I did.

Q. Prior to the 31st of October, 1906?

A. I went with Mr. French. I think it was about that time.

Q. Which French did you go with?

A. The old man, F. M.

Q. F. M. French? A. Yes, sir.

Q. I show you application 4825 in duplicate, and ask you if those are the applications that were made or filed with Mr. Leininger, the Register of the United States Land Office at Redding (handing)?

A. Yes, sir, that is my signature. I think that is the application.

Q. Look at the other one, too. They are made in duplicate? A. Yes.

Q. You swore to this, did you?

(Testimony of Clarence M. Prather.)

A. I suppose I did, I went through the formalities of the office.

Q. You went through the form of an oath, did you? A. Yes, sir.

Q. Who made those out for you?

A. They were made out in the Judge's office. They were all made out there together.

Q. What Judge's office?

A. I don't remember his name now.

Q. Do you know whose handwriting that is?

A. No, sir, I do not.

Q. Where did you first see that application?

A. It must have been in the office.

Q. When I speak of the application, I speak of the duplicate, the two papers, in whose office?

A. In the Land Office. I don't remember when I first saw it. The exact time, I don't remember.

Q. Was it given to you in Montague before you went to Redding?

A. No, sir, I don't believe it was.

Q. Are you familiar with Dr. Dwinnell's handwriting?

A. I don't believe I could swear to it.

Mr. SCHLESINGER.—Show it to him.

Mr. BLACK.—Q. Do you know in whose handwriting those applications are? A. I do not.

Mr. SCHLESINGER.—Show it to him. Perhaps I will give you the admission if you want it.

Mr. BLACK.—Q. Do you know in whose handwriting this relinquishment is, that is attached to

(Testimony of Clarence M. Prather.)

this paper, one entirely in handwriting, and the other on a blank filled in with writing?

A. I think this is an application that Dwinnell wrote out.

Q. You mean the relinquishment?

A. Yes, sir.

Q. Where was that written?

A. This, I think, was written in his office in Montague.

Q. The one on the blank form, where was that written?

Mr. VAN DUZER.—I object to "I think."

Mr. BLACK.—He is giving his judgment about it.

Mr. VAN DUZER.—I move to strike that out.

The COURT.—Let it remain.

Mr. VAN DUZER.—I will take an exception.

A. I think that was written in his office, too.

Mr. BLACK.—Q. That is, in Dr. Dwinnell's office? A. Yes, sir.

Q. Now, Mr. Prather, what is your best recollection as to where you got the applications that you filed in the Land Office, and at what point of time you got them?

A. My recollection is to the effect that I got it there at that lawyer's office who was making out those applications at the Land Office.

Q. That is in Redding?

A. Yes, sir, in Redding.

Q. Do you know his name?

A. No, sir, I don't remember his name.

(Testimony of Clarence M. Prather.)

Q. Did you receive any money from Frederick M. French, while you were all standing in line in front of the Land Office?

A. No, sir, not while we were standing in line.

Q. Before you got into the Land Office?

A. No, sir.

Q. Did you at any time in Redding?

A. After filing I got $10 from French on the street.

Q. Ten dollars? A. Yes, sir.

Q. Now, did you see Dr. Dwinnell, before you left Montague to go to Redding? A. Yes, sir.

Q. Did you have a conversation with him?

A. Yes, sir, I had a conversation with him.

Q. What was it about?

A. About different things.

Q. Did you have any conversation in regarding the expense of the boys in going down to Redding?

Mr. VAN DUZER.—I object to that as leading. It seems to me very leading.

The COURT.—It is a preliminary question, I suppose, Mr. Black, pretty soon we will find out how he came to make that application, and whether he made any agreement with any one.

Mr. BLACK.—I will state this is a witness who knows certain things that the Government depends on.

Mr. SCHLESINGER.—I do not think you ought to make that kind of a statement. It is not fair to the defense. Simply get through with the witness.

(Testimony of Clarence M. Prather.)

The COURT.—Let us get through with the witness.

Mr. VAN DUZER.—I move to strike out the last answer of the witness.

The COURT.—Let it remain.

Mr. SCHLESINGER.—I think the statement of counsel is more objectionable than the answer.

The COURT.—The objection is overruled. Let the witness answer the question.

Mr. BLACK.—Q. I will ask you the direct question: Did Dr. Dwinnell give you any money to give to any of the French boys or any one else, to pay their expenses down to Redding?

A. I don't know whether he gave me the money to pay expenses. He gave me the money to give to them.

Q. How much did he give you to give them?

A. He gave me, I think, about $45.00.

Q. What did he tell you to do with it?

A. He told me to give $25 to Rex Deter, and the balance to the French boys.

Q. Did you give it to them? A. Yes, sir.

Q. In Montague? A. Yes, sir.

Q. Did you go down to Redding with any of the people? A. I went down with several.

Q. Who were they?

A. I think there were the French's along and Rex Deter, John Gilpin, and another man I have forgotten his name, an Irishman.

Q. Gavigan?

(Testimony of Clarence M. Prather.)

A. Gavigan. I don't know whether Gagnon was there or not; I don't remember.

Q. What day did you get in line before the Land Office?

A. I don't remember the date. It was two or three days prior to the opening of the Land Office.

Q. Who first called your attention to the particular piece of land you made application to purchase?

A. I don't exactly understand the question. Who showed it to me?

(Reporter reads the last question.)

A. Why, Dwinnell, I guess. French showed me the land.

Mr. VAN DUZER.—I move that be stricken out, if the Court please.

The COURT.—Let it remain.

Mr. VAN DUZER.—Exception on the ground that he is guessing.

Mr. BLACK.—Did you make a relinquishment to any person?

A. I did.

Mr. SCHLESINGER.—One moment. I object to that upon the ground the relinquishment itself is the best and only evidence unless it has been lost or destroyed or its absence accounted for.

The COURT.—That is a preliminary question. I will allow it.

A. I did.

Mr. SCHLESINGER.—We except to it.

Mr. BLACK.—I ask you to look at the relinquishment that you have already testified to as having

(Testimony of Clarence M. Prather.)

been made out by Dr. Dwinnell and ask you to whom you gave those papers?

A. I gave those papers to Dr. Dwinnell.

Mr. BLACK.—I ask, now, if the Court please, that this application number 4825 in duplicate together with two relinquishments be marked Government's Exhibit No. 6.

Mr. SCHLESINGER.—Will you show them to us, Mr. Black?

Mr. BLACK.—Certainly.

Mr. SCHLESINGER.—I simply wish to interpose a formal objection to these, if the Court please; your Honor will see from an inspection of these papers that they appear to be dated long after these locations—one bears date December 1, 1906, and the other bears date November 26, 1906. If they are evidence at all, they are evidence in our favor.

The COURT.—The objection will be overruled; let them go in evidence.

Mr. SCHLESINGER.—Exception.

* * * * * * * * *

Mr. BLACK.—Q. How much money did you get for making the relinquishment?

A. Well I don't remember how much I got, I could not say.

Q. Well, have you any approximate idea of it?

A. Probably $250, may be.

Q. Who paid it to you? A. Dwinnell.

(Testimony of Clarence M. Prather.)

Q. Have you had any conversation with Dr. Dwinnell in regard to this case since the Indictment was filed?

Mr. SCHLESINGER.—One moment, I object to that as immaterial, incompetent, and irrelevant, and not within any of the issues charged in this Indictment.

The COURT.—The objection will be overruled.

Mr. SCHLESINGER.—We take an exception.

A. In a general way, yes.

Mr. BLACK.—Q. How long ago?

A. Oh, I don't remember, probably prior to coming down here two or three weeks. I think I told him I was subpoenaed on this case.

Q. And you have known Dr. Dwinnell, for a great many years?

A. Yes, I have known him quite a few years.

Q. And are very friendly? A. Yes, sir.

Cross-examination.

Mr. SCHLESINGER.—Q. Mr. Prather, let us dispose of this conversation question; did Dr. Dwinnell ask you to give any false testimony here or elsewhere?

A. He did not.

Q. In this timber and stone location of yours, Mr. Prather, did Dr. Dwinnell induce you, persuade you or ask you to make any false statement?

A. He did not.

Q. Before you made this location did you ever have any understanding, any agreement of any kind

(Testimony of Clarence M. Prather.)

whatsoever whereby your title should go the benefit of Dr. Dwinnell? A. I did not.

Q. Or any of the defendants?

A. No; of no one, no.

Q. And did any of these defendants request you to go into the Land Office and make any false statements concerning your application?

A. No, sir.

Q. Did you agree or have any understanding of any kind at all at the time you made your location that you should relinquish it to the Government?

A. No, sir.

Q. And did you as a matter of fact relinquish your location to the Government until long after you had made it? A. Quite a while after.

Q. In other words, calling your attention to this relinquishment which I will now read to you "Montague, California, November 22d, 1906. Know all men by these presents that I, Clarence M. Prather, do hereby abandon and relinquish to the Government of the United States all my interest in the east half of the southwest quarter, northwest quarter of southwest quarter, and southwest quarter of northwest quarter of section 14, township 44," etc. Did you make that relinquishment at the time you made your location in the Land Office or did you make it at the time it bears date?

A. I made it at the time it bears date.

Q. And calling your attention to your relinquishment bearing date December 1, 1906, did you make that relinquishment at the time it bears date?

(Testimony of Clarence M. Prather.)

A. I did.

Q. I ask you the general question, did you ever have any agreement of any kind at all with any one of these defendants to the effect that you should falsely swear that you were taking up this land for your own benefit? A. I certainly did not.

[Testimony of James F. French, for the United States.]

JAMES F. FRENCH, called as a witness for the United States, being duly sworn, testified:

Mr. BLACK.—Q. Where do you live, Mr. French? A. Montague.

Q. How long have you lived there?

A. Well, I have lived there for about, right in the town of Montague, for about two years.

Q. You are a son of Frederick M. French?

A. Yes, sir.

Q. You are a married man? A. Yes, sir.

Q. Do you know Dr. Dwinnell?

A. Yes, sir.

Q. How long have you known him?

A. Well, I have known him personally acquainted with him for about three years, known of him for about 10 or 12 years.

Q. Before the 31st of October, 1906, did you have any conversation with Dr. Dwinnell, in reference to taking up a piece of land? A. Yes.

Q. Where was that conversation?

A. In Dr. Dwinnell's office.

Q. What was said at that time, Mr. French?

(Testimony of James F. French.)

A. Well, he first wrote a letter to me, that is, he wrote a letter to the French Brothers, wanting to know if we would go and take up a piece of land.

Mr. SCHLESINGER.—Is that the letter you claim was destroyed in the fire?

Mr. BLACK.—Yes.

A. He wanted to know if we would take up a piece of land, wanted to take up a piece of land and make a couple of hundred dollars, with it, if we did, we could do it, and he would pay all expenses.

Q. He said he would pay all expenses?

A. Yes, sir.

Q. Now, after that letter was sent, how long after that letter was sent did you see Dr. Dwinnell in Montague?

A. Oh, I don't remember exactly, maybe a week perhaps.

Q. What was said at that time, in his office? Who was present first?

A. My father and I were there. I asked him if it made any difference and he told me—at first I did not want to go, and he wrote me a letter and told me it would be all right. My father had told him—

Q. You are referring to a second letter?

A. Yes, he wrote this letter to me.

Q. Was that letter signed by Dr. Dwinnell?

A. Yes.

Q. What did you do with that letter?

A. Well, it was burned up with the rest of them.

Q. Who burned it up?

(Testimony of James F. French.)

A. I don't know. I don't really know what became of the letter.

Q. You have looked for it and cannot find it?

A. I could not find it, no.

Q. After the second letter then you had a conversation with Dr. Dwinnell, in this office?

A. Yes, sir.

Q. What was said then?

A. He said that there was no danger; that they would not come on to me for anything if I took up a piece of land. He said he would not get us into trouble anyway.

Q. What was the agreement, if any, that you made with him then?

Mr. SCHLESINGER.—I object to that unless he gives the conversation.

Mr. BLACK.—That is what I am asking for.

A. He told me it was all right, that I was doing nothing wrong, so I told him I would go out and take up a piece of land.

Q. Was there any sum agreed upon?

A. $200.

Q. Now, on that day that you went to Montague to go to Redding, whom did you meet in Montague?

A. Well, I, don't really remember. There was I and my brother went to town together; my brother Sam, and there was Jack Gilpin; I seen Jack Gilpin, he was there, we were in his saloon, and Charlie Freer.

Q. Well, go and tell what happened. How many were in the room at Gilpin's place?

(Testimony of James F. French.)

A. I think there was four of us.

Q. Was anything said by Gilpin as to how you could go?

A. Well, when they got ready to leave there, when we were to go on the train, he said that some *of had* better buy tickets to Dunsmuir and some to Redding; it would not look very well for the whole bunch to go down together; so I and my brother Sam bought tickets to Dunsmuir.

Q. From there at Dunsmuir, what did you do?

A. We bought a ticket at Dunsmuir, on to Redding.

Q. What did you do, where did you go when you reached Redding?

A. We went down to Klinesmith's Hotel, the Temple Hotel.

Q. How many people were there? That is of your party?

A. Well, I don't remember how many in particular.

Q. How many were in the room that you occupied?

A. I think there were either four or six in the room.

Q. Who were they?

A. Charlie Freer was one, Frank Richie was another and I think my brother Sam was there and myself, that is all that I remember in particular. It has been quite a while ago.

Q. What time did you start from the hotel, if

(Testimony of James F. French.)

you did start to go to get in line before the Land Office?

A. I couldn't say as to that. I was still in bed and was woke up to go.

Q. Who woke you up? A. Mr. Gilpin.

Q. What did he say?

A. He came and told us that we wanted to be getting up there, that there was a bunch gathering there at the Land Office.

Q. What time did you go down to the line?

A. Well, just as soon as I got up and dressed I went right down to the Land Office door.

Q. Do you remember what position you had in the line?

A. I don't remember my number, no.

Q. Now, at the time that you were in line did you receive any money from anybody?

A. Well, yes.

Q. Who?

A. I received money from my father.

Q. Do you know where he got it?

A. No, I don't know where he got it.

Q. I show you application No. 2840 in duplicate and signed James Frederick French, with a Certificate of Clarence W. Leininger, Register, and attached to that what purports to be a relinquishment dated the 23rd of November, signed by James F. French, and witnessed by G. W. Dwinnell, and another paper that purports to be a relinquishment on a printed blank 4-6-21, signed also by James Frederick French, and witnessed by G. W. Dwinnell, and

(Testimony of James F. French.)

Benjamin F. French. I will ask you first as to the application, did you file those before the Register and swear to them before the Register on the 31st day of October, 1906? A. Yes.

Q. And at the time you swore to them is it a fact that you had a contract with Dr. Dwinnell to relinquish to him for $200. A. Yes.

Mr. SCHLESINGER.—One moment. We object to that, if the Court please as calling for the opinion and conclusion of the witness. That is the very point in issue, was there a particular contract or agreement he made. Let him state the facts according to his recollection.

Mr. BLACK.—That is what I want.

The COURT.—That is the better way, but Mr. Black does not seem to be able to ask the witness in that way. Let the witness answer it and give the details. Of course, if there was any agreement there must have been something said between the parties out of which that arose.

Mr. VAN DUZER.—There is another objection, to it. A general contract to do something is not what is contemplated by the law. It must be a contract whereby the title to be obtained to the land would inure to Dr. Dwinnell. It cannot be a general contract to do something. That is the object of the statute.

The COURT.—Proceed with the witness, and let us get through.

Mr. BLACK.—Q. I will put the question in this form, when you went to the Land Office was it be-

cause of the conversation that you have related whereby Dr. Dwinnell had agreed to give you $200, if you would make application and then relinquish the land to him.

Mr. SCHLESINGER.—That is certainly a very vicious question and clearly calling for the mental conclusion of the witness.

The COURT.—I think the objection is well taken, and in addition to that I have not heard the witness testify to any such thing as that either. I suppose it is very easy to find out from him before he made that application whether he had any talk with Dr. Dwinnell as to what he was to do with the land if he got it?

Mr. BLACK.—Q. You heard the Court's question, answer it? A. Yes.

The COURT.—Q. What was the conversation?

A. I was to relinquish the land to Dr. Dwinnell.

Mr. BLACK.—Q. In consideration of how much money? A. $200.

Q. Later on, on the 3d day of November, and then on the 30th of November, did you have any dealings with Dr. Dwinnell in reference to the papers that purport to be relinquishments relating to that land?

A. I don't remember when this paper was made out or anything like that.

Q. You signed it did you?

A. Yes, I signed it.

Q. Where did you sign it?

A. I signed it on Harry Cash's ranch.

Q. Who gave it to you?

(Testimony of James F. French.)

A. It was sent out there by my father for me to sign.

Q. You were working at the time, were you?

A. Yes, sir.

Q. When did you sign the second one?

A. The second one?

Q. Yes? Or did you sign them both at the same time—they are different dates?

A. Well, I don't know.

Q. You don't remember? A. No, sir.

Q. Where were at that time?

A. No, sir, I didn't.

Q. Now, did you get any money for doing that?

A. Yes, sir.

Q. Where did you get it?

A. When I signed this paper here the $200 was sent by my father and these papers, and I signed the paper and he gave me the $200 and then he took the paper back to town.

Mr. BLACK.—We offer now, if the Court please, that application with the relinquishment as Government's Exhibit No. 7.

Mr. SCHLESINGER.—We have no objection to it.

* * * * * * * * * *

Cross-examination.

Mr. TAYLOR.—Q. Mr. French, you spoke about Mr. Gilpin saying to you for some of you to buy tickets to Dunsmuir, and some to Redding?

(Testimony of James F. French.)

A. Yes, sir.

Q. Mr. French, you were going down a day or two ahead of the opening of the Land Office were you not? A. Yes, sir.

Q. And you did not care to have other people know that you were going to the Land Office?

A. I did not care so much. It was Mr. Gilpin's request.

Q. Did you understand it to be so that other people would not think that parties like yours were going there so early. A. Yes, sir.

Q. That is all there was to that?

A. Yes.

Mr. SCHLESINGER.—Just one question, if the Court please. Q. Mr. Black asked you, Mr. French, whether you were a married man? A. Yes, sir.

Q. What is your age, please, Mr. French?

A. My age is 28 years old.

Q. Mr. French, you recall, do you not, making this affidavit before the Land Office?

A. Yes, sir.

Q. Do you know whether it was read to you before you swore to it?

A. I couldn't remember whether it was.

Q. Did you know its contents before you signed it? A. Well, yes.

Q. Knowing its contents did you raise your hand and swear it was true? You recall that, do you?

A. Yes, sir.

Mr. TAYLOR.—Q. Do I understand that you have testified to the only contract you had with Dr. Dwinnell? A. What is that?

(Testimony of Samuel Leonard French.)

Q. You have testified to the only contract, to all the contracts or statements that you made to Dr. Dwinnell? At any rate you testified to all there was? A. Yes, I think so.

[Testimony of Samuel Leonard French, for the United States.]

SAMUEL LEONARD FRENCH, called as a witness on behalf of the United States, being duly sworn, testified:

Mr. BLACK.—Q. Mr. French, where do you live? A. Montague.

Q. How long have you lived there?

A. Well, right in town about two years.

Q. Do you know Dr. Dwinnell?

A. Yes, sir.

Q. Do you know Gilpin? A. Yes, sir.

Q. Deter? A. Yes, sir.

Q. Do you know Gagnon? A. Yes, sir.

Q. Before the 31st of October, 1906, did you have any conversation with any of those people that I have mentioned in regard to taking up a piece of land?

A. None whatever.

Q. Did you ever receive any letter from any person? A. Yes, sir.

Q. In regard to taking up a piece of land; by whom was that letter signed?

A. By Dr. Dwinnell.

Q. To whom was it addressed?

A. To French Brothers.

Q. Did you read that letter? A. Yes, sir.

(Testimony of Samuel Leonard French.)

Q. What did it say? That is a letter that was burned? A. Yes, sir.

Mr. VAN DUZER.—We object to that question, if the Court please, in that form, because the destruction of the letter has not been proven; his name was not mentioned in that letter at all nor was the land mentioned in it, and it is irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. VAN DUZER.—Exception.

Mr. BLACK.—Q. What did that letter say?

A. Well, sir, he wanted us to take timber and relinquish it to him and he would give us $200, and he told us we would have a right back.

Q. Now after receiving that letter at any time did you have any conversation with Dr. Dwinnell?

A. No, sir.

Q. Did you go with any person down to Redding for the purpose of making application?

A. Yes, sir.

Q. With whom did you go?

A. Well, there was Jack Gilpin, and Fred French, and Frank French and my father and myself.

Q. At Montague, was any money paid to you by any person for expenses? A. Yes, sir.

Q. Who gave it to you?

A. Clarence Prather.

Q. How much was given? A. $10.

Q. Did you see any money given to any of your other brothers? A. No one only Fred.

Q. How much did Fred get? A. $10.

(Testimony of Samuel Leonard French.)

Q. Now at what time did you receive the application that you were to file in the Land Office? Let me ask you to look at this paper, 4818 made out in duplicate, and state to me where you first received that or if you had received it where was it?

A. In Redding.

Q. Who gave it to you?

A. I think Dr. Dwinnell gave me that paper.

Q. Where were you at the time?

A. We were in line at the door at the Land Office.

Q. You went before Mr. Leininger and did you swear to that paper? A. Yes, sir.

Q. Later on did you see Dr. Dwinnell in reference to the relinquishment?

A. Not until the date that I relinquished to him.

Q. I show you a written paper that purports to be a relinquishment signed Samuel L. French, witnessed by G. W. Dwinnell and F. M. French, and also one dated November 30, 1906, signed Samuel M. French, and witnessed by G. W. Dwinnell, and Benjamin F. French, and ask you to state to the jury under what circumstances you signed those and where you were when you signed them?

A. I was in Dr. Dwinnell's office, when I signed those papers.

Q. Did you get any money for it?

A. Yes, I got $200.

Q. Who gave it to you? A. Dr. Dwinnell.

Mr. BLACK.—We offer this paper now as Government's Exhibit 8, the paper formerly marked No. 2, for identification.

(Testimony of Samuel Leonard French.)

* * * * * * * * * *

Mr. BLACK.—Q. When you went to Redding did you get your ticket for clear through?

A. No, sir, I got my ticket for Dunsmuir.

Q. Did any of the others buy their tickets to Dunsmuir? A. Yes.

Q. Who? A. My brother Fred.

Q. And then when you arrived at Dunsmuir?

A. We got off the train there and got tickets through to Redding.

Q. Arriving at Redding, where did you go?

A. We went to the Temple Hotel, I think.

Q. Were your expenses paid at that hotel?

A. I don't remember whether they were or not.

Q. Do you remember whether you paid anything or not?

A. I did not pay anything at the hotel, no.

Q. You did not. Did you receive any money while in line? A. Yes, I think I did.

Q. Who gave it to you? A. My father.

Q. What time of the day did you get in line before the Land Office?

A. Well, it was sometime in the morning, pretty early, probably 5 o'clock.

Q. Just relate why you went out?

A. Well, they wanted us to get up there in time so as to get in line.

Q. Who told you to do that?

A. Mr. Gilpin.

Q. One of the defendants? A. Yes, sir.

(Testimony of Samuel Leonard French.)

Q. What did he say?

A. Well, he told us we would have to be getting up there, that there was a bunch coming in there, and we wanted to get there in time.

Q. How many of you went up together after that?

A. Well, there was five or six.

Q. Do you remember what your number was in line? A. No, I don't now.

Cross-examination.

Mr. TAYLOR.—Q. You wanted to be there a couple of days before the Land Office opened for filing?

A. Yes, sir.

Q. In buying tickets to Dunsmuir and not buying them to Redding that was so people would not know you were going there to get in line?

A. That was Mr. Gilpin's idea.

Q. You contemplated that lots of people were going to be there and who might get positions ahead of you there? A. Yes.

Q. And there were after you arrived there a great many people? A. Yes.

Q. Got in line?

A. Well, there was only three or four ahead of us.

Q. Afterwards they did, finally it got so there was a line of 250 or 300 there?

A. Oh, yes, quite lots of them.

Q. So your object was not to alarm other people with the idea that you were going to Redding to take up this land? A. Yes.

(Testimony of Samuel Leonard French.)

Q. There was no other purpose in doing it that way? A. No.

Q. I understood you never had any conversation with anyone prior to the time you went down that far? A. No, nothing more than the letter.

Q. Now, that letter, when did you last see that letter?

A. Well, I couldn't tell just when it was.

Q. About how long ago?

A. Well, I have not since we received it, when I saw it.

Q. Not at all? A. No.

Q. When did you receive it?

A. Well, I guess it was in October sometime.

Q. Do you remember about that? A. Yes.

Q. In October of what year? A. 1906.

Q. How was the letter addressed on the inside?

A. Addressed to the French Brothers.

Q. The French Brothers? A. Yes, sir.

Q. How was it addressed on the outside?

A. To the French Brothers.

Q. Did you get the letter out of the mail?

A. Yes.

Q. Where? A. At Mayten.

Q. Do you know Dr. Dwinnell's handwriting?

A. Yes, sir.

Q. How long had you been familiar with it then?

A. I had not been familiar with it then, but I know it now.

Q. So that you can remember it after three years

(Testimony of Samuel Leonard French.)

well enough to say that letter was in his handwriting?

A. Well, it was from him, his name was signed to it.

Q. Then you remember enough about that letter that you can say after three years that the letter was in his handwriting?

A. Well, it was evidently from him.

Q. It was. I ask the witness to answer that question. A. I could not swear to that.

Q. It was not addressed to you?

A. It was addressed to the French Brothers.

Q. Was there any mention of your name inside at all? A. No, sir.

Q. Any mention of the name of either brother of yours inside at all? A. No, sir.

Q. When you went to the Land Office you read the sworn statement? A. Yes, sir.

Q. You were perfectly familiar with it when you stood up there and took the oath? A. No.

Q. Didn't you know what you were swearing to?

A. No, I didn't know.

Q. You didn't know? A. No, sir.

Redirect Examination.

Mr. BLACK.—Just explain Mr. French, what you meant by saying you did not know what you were swearing to?

A. Well, I supposed that I was doing all right. Mr. Dwinnell told me that I was doing no harm at all, said I had a perfect right to do it.

(Testimony of Samuel Leonard French.)

Q. When did you swear to that you knew that he had told you if you did that and then relinquished it to him he would give you the $200?

A. Yes, sir.

Recross-examination.

Mr. TAYLOR.—Q. Didn't you say you never had any talk with Dr. Dwinnell?

A. No only through the letter.

Q. Then Dr. Dwinnell didn't tell you in that—Dr. Dwinnell never told you then that you would not be doing anything wrong?

A. He told me in the letter.

Q. Did he say so in your letter? A. Yes.

Q. What else did he say, give use the contents of that letter, as much as you remember?

A. He told me in the letter—

Q. I want the substance of it, if you can remember it.

A. He just told us we had a right to do all of this.

Q. To do what?

A. To relinquish our claim to him and he would give us $200.

Q. Is that what there was in the letter?

A. Yes, sir.

Q. Was that all there was in the letter?

A. No, not exactly.

Q. What was the rest of it?

A. He wanted us to go and take this timber and relinquish it.

Q. Describe the timber? A. No.

Q. Just says, "the timber"? A. Yes.

(Testimony of Benjamin F. French.)

Mr. SCHLESINGER.—Q. Mr. French, Dr. Dwinnell, did not go with you into the Land Office, did he?

A. He was at the Land Office.

Q. Did he go into the Land Office with you when your hand was raised and you took an oath to the truth of the statement in that affidavit?

A. No, sir.

Q. You were there alone, with the clerk of the Land Office?

A. I and my brother; they swore in the two of us.

Q. Do you read English? A. Yes, sir.

Q. How old are you? A. I am 26.

Mr. SCHLESINGER.—That is all.

[Testimony of Benjamin F. French, for the United States.]

BENJAMIN F. FRENCH, called as a witness for the United States, being duly sworn, testified:

Mr. BLACK.—Q. Where do you live?

A. Montague, Siskiyou County.

Q. How long have you lived there?

A. About three years.

Q. Do you know the defendants in this case?

A. Yes, sir.

Q. Before the 31st day of October, 1906, did you have any conversation with any of the defendants in regard to taking up some timber land?

A. Yes, sir.

Q. Where did you get the paper or the application that you made at the Land Office?

(Testimony of Benjamin F. French.)

Mr. SCHLESINGER.—Do you mean the blank application?

Mr. BLACK.—I mean the application filled in.

Q. I hand you application No. 4817, in duplicate, and ask you where you first saw that application?

A. At the Redding Land Office, I believe.

Q. Who gave it to you?

A. I don't remember as to that, who gave it to me.

Q. Were you in line in front of the Land Office at the time that was given to you?

A. I don't know.

Q. You do not remember?

A. I don't remember.

Q. Are you one of the French Brothers, the son of Frederick M. French? A. Yes, sir.

Q. Did you see a letter that was addressed to the French Brothers, before the 31st day of October, and before the trip down to Redding, signed G. W. Dwinnell? A. I did, yes.

Q. Is that the letter that was destroyed?

A. Yes, sir.

Q. What did that letter contain?

A. It was to the effect that if we wanted to go and file on these lands, and hold them until this land was thrown open so that it could be scripped, we were to realize $200 out of it.

Q. Was there anything in that letter said as to any further rights you might have?

Mr. SCHLESINGER.—Do not lead him, Mr. Black. It is hardly fair to us.

(Testimony of Benjamin F. French.)

A. No, sir, I don't believe there was in the letter.

Mr. BLACK.—Q. Are you able now to state positively the contents of the letter?

A. No, sir, I am not.

Q. What time did you go to look at the land that you made application for?

A. I don't remember the dates.

Q. With whom did you go? A. My father.

Q. How did you go? A. In a rig.

Q. Was that trip that you made after your two brothers Sam and Fred, I think they are, had gone to Montague, with a view to going to Redding?

A. Yes, sir, we both started at the same time. We started to look at the land, and they from Montague at the same time.

Q. How many days after they got to Redding did you arrive there? A. I believe the next day.

Q. When you arrived at Montague, who else went with you to Redding? A. My father.

Q. Just you and your father?

A. I think that is all.

Q. Arriving at Redding, where did you go?

A. We went to the Hotel.

Q. Do you remember the name of the Hotel?

A. No, sir, I don't remember the name of the Hotel.

Q. Who was there at the Hotel of your party?

A. There was Mr. Freer, Mr. Jacquette, and my two brothers, and Mr. Gilpin, and Mr. Deter, and Mr. Dwinnell.

(Testimony of Benjamin F. French.)

Q. What time did you take your place in the line in front of the Land Office?

A. About five o'clock in the morning between four and five I should judge.

Q. Why did you go at that hour of the morning?

Mr. SCHLESINGER.—I object to the question, if your Honor please, as immaterial and incompetent, and in no wise binding on the defendants.

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—We will take an exception.

A. Because Mr. Gilpin was on watch there to get us up in the morning in time to go down there, and was watching the trains, etc., to see there was not anyone got in ahead of us, to head us off.

Q. Did he wake you up? A. Yes, sir.

Q. And then you went and got in line as soon as you could? A. Yes, sir.

Q. How long were you in line there?

A. Two days, I believe.

Q. Any money given to you while you were there in line?

A. I don't think there was any money given to me while I was in the line.

Q. Not to you? A. Not to me.

Q. Did you see your brothers get any?

Mr. SCHLESINGER.—*If you say it?*

A. No, sir.

Mr. BLACK.—Q. If you did not see it say so.

A. No, sir.

Q. You, personally, did not get any money?

A. No, sir.

(Testimony of Benjamin F. French.)

Q. Now, when you went into the Land Office, you swore to that paper did you? A. Yes, sir.

Q. State anything that transpired between you and Dr. Dwinnell before you went down to Redding, at any time before you went down to Redding. I don't know that ever I had any talk personally with Dr. Dwinnell about this.

Q. The letter is the only communication that you had personally? A. Yes, sir.

Q. After going to the Land Office, and later on, did you have any conversation with Dr. Dwinnell, in regard to relinquishment of land? A. I had.

Mr. SCHLESINGER.—Any testimony as to an agreement made after location we object to as incompetent, irrelevant and wholly immaterial, and not within the law. The law denounces the making of a prior agreement, and not the making of a subsequent one.

The COURT.—Certainly. If the agreement was not made until after the application was made, it would be so. If any paper was executed in pursuance of a prior agreement, I suppose that can be shown.

Mr. SCHLESINGER.—That is so. He has already testified positively not once, but twice, that there was no prior understanding or agreement. All he knows about it was the reception of a letter at the ranch which has since been destroyed.

The COURT.—I will overrule the objection.

Mr. SCHLESINGER.—We will take an exception.

(Testimony of Benjamin F. French.)

Mr. BLACK.—Q. Where was the conversation had in regard to the relinquishment?

A. In Mr. Dwinnell's office.

Q. I will show you a paper that is dated November 26th, 1906, and signed B. F. French, witness by G. W. Dwinnell, and ask you if you know who filled that out, that is, the written part of it?

A. Yes, sir.

Q. Who did it?

A. That is Mr. Dwinnell's handwriting.

Mr. SCHLESINGER.—So as not to take up the time with objections let it be understood all this subject to our objection.

The COURT.—One objection is as good as a thousand.

Mr. SCHLESINGER.—Yes, but I want to take advantage of it in case of necessity.

Mr. BLACK.—Q. I hand you also, a relinquishment on form 4-621, dated Nov. 30th, 1906, signed by Benjamin Franklin French, and witnessed by G. W. Dwinnell, and F. M. French, and ask you if you know in whose handwriting that document is so far as it is in writing?

A. That is in Mr. Dwinnell's handwriting.

Q. Where was that paper made, if you remember? A. I don't remember.

Q. Did you receive any money for this transaction? A. Yes, sir.

Q. How much? A. $200.

Q. Who gave it to you?

(Testimony of Benjamin F. French.)

A. It was sent to me through my father by Dr. Dwinnell.

Mr. SCHLESINGER.—Q. Do you know that? Do you know that your father obtained it from Dr. Dwinnell?

A. I have his word for it.

Mr. SCHLESINGER.—I move to strike out the answer.

The COURT.—Let it be stricken out.

Mr. BLACK.—That is, so far as the Dwinnell part of it.

The COURT.—Certainly, he does not know.

Mr. BLACK.—The answer so far as he says he received $200 from his father—

The COURT.—That can remain.

Mr. BLACK.—We now offer this paper as Government's Exhibit No. 9.

* * * * * * * * *

Mr. BLACK.—Q. Did you pay any expenses in the Land Office or at the hotel in Redding at all?

A. No, sir.

Cross-examination.

Mr. SCHLESINGER.—Q. What is your age?

A. Twenty-seven years of age.

Q. When you appeared before the Land Office were you accompanied by any one of these defendants, when you went to the Land Office and took this affidavit?

(Testimony of Benjamin F. French.)

A. I don't remember as I was. I don't remember about that.

Q. Did you ever in your life, prior to October 31st, 1906, have any arrangement or agreement, or understanding, that your title should go for the benefit of any one of these defendants? I think you have already answered that you did not. Is that your answer? A. I was to relinquish.

Q. Did you ever have in your life any talk with Dr. Dwinnell, or any one of these defendants that you would make a relinquishment with respect to this land?

A. Through that letter, I believe, that is all.

Q. Only that letter, in other words, in connection with this matter, the land described in the sworn statement, you had no talk with Dr. Dwinnell or any one of these defendants about it. You may answer that yes or no. A. No, sir.

Q. Is it not true that you did not relinquish this land back to the public domain until November 30th, 1906? A. That is right.

Q. One month after you had sworn to your filed application, is that not true? A. Yes, sir.

Q. Did you, Mr. French, when you signed this affidavit, understand its contents?

A. Yes, sir.

Q. You had read it? A. Yes, sir.

Q. And knew exactly the matters contained in the affidavit, did you? A. Yes, sir.

Q. And so far as you then knew and so far as you

(Testimony of Benjamin F. French.)

now know, every word contained in this affidavit is true? A. Yes, sir.

Q. In other words you do not desire to retract a single statement contained in this exhibit, do you? Your answer is you do not? A. Yes, sir.

Q. There has been some talk—for what purpose I cannot understand, perhaps you do—as to a line in front of the Land Office. You were in that line, were you not? A. Yes, sir.

Q. There were also in that line some hundred and fifty other persons about to purchase land from the Government? A. Yes, sir, I think so.

Q. Did you know any of those other persons, or were they all strangers to you?

A. No, sir, I knew several.

Q. You have also, spoken Mr. French, about the burning of a letter. Did you yourself burn that letter? A. No, sir.

Q. Did you see that letter destroyed?

A. No, sir.

Q. You do not know personally what became of that alleged letter? A. I don't know exactly.

Q. That letter was addressed, you say, to the French Brothers? A. Yes, sir.

Q. Were you in business, you and your brothers, under the name of the French Brothers in Siskiyou County?

A. No, sir, but oftentimes letters came to us addressed "French Brothers."

Q. Did you ever in your life receive a letter or see

(Testimony of Benjamin F. French.)
a letter other than the one that you have mentioned addressed to the French Brothers?

Q. Did you see the envelope in which this letter was contained? A. Yes, sir.

Q. Did you ever have any business with Dr. Dwinnell, prior to the receipt of this letter?

A. I don't know that I did.

Q. Did you ever see any single specimen of his handwriting? A. Yes, sir.

Q. In what way?

A. In regard to these papers here.

Q. I mean prior to the reception by you of the letter?

A. Not before this letter. I don't think I ever did.

Q. Yet did you recognize the handwriting as being that of Dr. Dwinnell's?

A. His name was signed to this letter. I supposed that was his handwriting.

Q. You have given the contents of this letter as best as you can? A. Yes, sir, I think so.

Q. You are very certain that the letter said exactly what you have stated to these twelve men?

A. Yes, sir.

Q. Have you talked with your family since you have testified before the Grand Jury as to what that letter contained?

A. I have not.

Q. Have you talked over this matter at all since you were summoned to appear before the Grand Jury? A. No, sir, I have not.

(Testimony of Benjamin F. French.)

Q. Have you or your family, or any member of your family ever exchanged a single word about this entire case from the time you made your relinquishment to the present date?

A. Yes, sir.

Q. What have you talked about—about it, generally?

A. There was a little dispute about the way it was going, that is all.

Q. A dispute among the members of your family as to the way the matter was going?

A. Yes, sir.

Q. That is quite natural; in other words, you did not like the way things were going, did you?

A. No, sir.

Q. Not liking the way things were going, you complained to members of your family?

A. Yes, sir.

Q. In some of these talks, members of your family complained to you? A. Yes, sir.

Q. In other words, you had your version about this transaction and they had their version about this transaction; is that true? A. Yes, sir.

Q. That is all.

Redirect Examination.

Mr. BLACK.—Q. Now, I desire you to explain what you were disputing about. What was it all about?

Mr. SCHLESINGER.—Q. Just explain that. That is what I want to get at.

(Testimony of Benjamin F. French.)

A. As to whether there was going to be any trouble or not over this transaction.

Mr. BLACK.—Q. Explain it, what kind of trouble?

A. Well, my father kind of talked us boys into this. We kind of had a thought towards him. That is about all of that.

Q. He had advised you that Dr. Dwinnell, was all right, and that you could trust him?

A. Yes, sir.

Q. You thought that it was all right to go down there and swear as you did?

Mr. SCHLESINGER.—He did not say anything of the sort. He said he swore to the entire truth.

Mr. BLACK.—Let us see.

Q. Did you completely understand the question that was asked you by Mr. Schlesinger? He asked you if everything in here was the truth as you understood it then, and as you understand it now. I ask you to look at this clause: "I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole, or in part to the benefit of any person." I understood you to say on your direct examination that when you went to the Land Office it was with the idea that the land that you were applying for was

(Testimony of Benjamin F. French.)

to go to Dr. Dwinnell, and you were to get $200 for the transaction. Is that the fact?

A. I don't know. I did not have any personal talk, I don't think, with Dr. Dwinnell, before we went there.

Q. I am not asking you that. Did you understand that that was what it was all about?

A. Yes, sir.

Mr. SCHLESINGER.—The understanding of this man, whether good or bad, cuts no figure. We want his testimony as to facts.

Mr. BLACK.—That is exactly what is in the mind of the witness. The testimony of B. F. French, so far as this witness is concerned, is that when he went to—

The COURT.—Proceed with the witness and find out what he knows about it.

A. Yes, sir, that was my understanding, that I was to realize $200, for relinquishment of this land.

Mr. BLACK.—Q. You had that in mind when you swore to this? A. Yes, sir.

Q. And that was the real condition of your mind when you went in there? A. Yes, sir.

Mr. SCHLESINGER.—Now, I want to ask him another question. This has opened a new field.

Recross-examination.

Mr. SCHLESINGER.—Q. Did that letter, which was the only communication you claim to have had with Dr. Dwinnell say a single word about $200; Yes or no? A. Yes, sir.

Q. Did that letter mention $200?

(Testimony of Benjamin F. French.)

A. Yes, sir.

Q. Did it describe the land?

A. No, sir, it said timber land.

Q. Did you know what land you intended to file on when you went to this Land Office?

A. I did, yes.

Q. Did the letter describe it? A. No, sir.

Q. The letter did not describe it?

A. No, sir.

Q. The letter was a complete blank on that subject? A. It was in regard to land.

Q. How many people did you go to to borrow money in Siskiyou County to prove up your location? A. Not a single one.

Q. You did not go to any? A. No, sir.

Q. Do you know how many people your father went to? A. No, sir.

[Testimony of Mrs. F. M. French, for the United States.]

Mrs. F. M. FRENCH, called as a witness for the United States, being duly sworn, testified:

Mr. BLACK.—What is your name?

A. Harriet A. French.

Q. Your are the wife of F. M. French?

A. Yes, sir.

Q. And the mother of the French boys, that have testified here? A. Yes, sir.

Q. Where do you reside now?

A. At Klamathen.

Q. Did you formerly reside near Montague?

(Testimony of Mrs. F. M. French.)

A. Yes, sir, in Montague.

Q. I will ask you if, in the month of September, or the month of October, prior to the 31st of October, 1906, you saw a letter addressed to the French Brothers, that was sent to your house?

A. Yes.

Q. Do you know what became of that letter?

A. Yes, sir.

Q. What became of it?

A. I threw it in the fireplace.

Q. Did you read the letter? A. Yes, sir.

Q. What was the contents of the letter?

A. Mr. Dwinnell wrote to ask the boys to take up this land for him, and they should not waive their rights.

Q. Was there any consideration mentioned for each of them? A. Yes, sir, $200.

Q. Why did you destroy that letter, Mrs. French?

A. I did not want anybody to see those letters—those other letters.

Q. Do you know the defendant, Rex Deter?

A. Yes, sir, he has been to my house.

Q. Do you remember the occasion of Mr. French's doing some surveying or cruising, running the lines for land that was to be applied for by these various people?

A. I knew that Mr. Deter was at our house.

Q. How many days was he there?

A. He was there about two or three days; then he went away and came back again, and then he was there a couple of days more, I think.

(Testimony of Mrs. F. M. French.)

Q. What was he doing there?

A. Hunting a timber claim.

Q. Did he go out in company with your husband and any of your boys at any time?

A. Yes, sir, Mr. French and Sam.

Cross-examination.

Mr. SCHLESINGER.—Q. Mrs. French, do you recall about when it was that you received that letter, what month of the year? Just your best recollection. It is difficult to remember all of these things?

A. The first of September, some time. I don't know just exactly the date.

Q. You did not like the contents of it, so you at *one* put it in the fire, did you, Mrs. French?

A. Yes, sir.

Q. You did not hold it in your hand, probably, longer than four or five minutes?

A. I don't know. The letter laid there several days.

Q. You did not show it to anybody?

A. No, sir, indeed I did not.

Q. You did not show it to a single living human being, but put it in the fire. You did not show it to your boys?

A. My boys seen it, certainly, before I saw it.

Q. Did you open the letter when it came?

A. No, sir, I did not open the letter.

Q. Did the boys give it to you?

A. I don't know as they particularly gave it to me, but it laid where I got it.

Q. Was it unopened before the boys received it?

(Testimony of Mrs. F. M. French.)

A. I don't know as to that.

Q. Did you open it yourself, break the envelope?

A. No, sir, I did not.

Q. Did your husband give it to you?

A. It came through the postoffice.

Q. Who was it that gave it to you?

A. I could not say who gave it to me. I don't think anybody gave it to me. I think I picked it up off the table.

Q. It was simply lying around there loose among some other papers? A. Yes, sir.

Q. Did you ever see any other letters from Dr. Dwinnell? A. To my husband I did.

Q. Did you likewise destroy those letters?

A. Yes, sir.

Q. Do you know how many letters from Dr. Dwinnell to your husband that you destroyed?

A. No, sir, I could not say as to that.

Q. You destroyed that letter because you wanted to protect your sons, is that the idea?

A. Yes, sir.

Q. To protect them from what?

A. To protect them from—

Q. From the things contained in the letter?

A. Yes, sir.

Mr. BLACK.—Let her finish her answer. I will ask the witness to answer.

Mr. SCHLESINGER.—Q. Have you answered? My friend thought you had not answered. Did you answer the question?

(Testimony of Mrs. F. M. French.)

Mr. BLACK.—She was about to answer when counsel put another question.

The COURT.—You can ask her the question again.

Q. Did it now occur to you that for the protection of your sons against somebody or something—

A. I did not want my sons to take up this land for Dr. Dwinnell, at all.

Q. You sons had not seen this letter, had they?

A. Certainly, they had seen it.

Q. Did you not think it would be better to take and preserve the letter than destroy it?

A. Yes, sir, I am very sorry that I ever destroyed that letter.

Q. Did your sons know that you had destroyed it? A. Do they know it?

Q. Did they know it then?

A. I don't know whether they knew that I destroyed it at the time or not.

Q. Who was present, Mrs. French, when you destroyed that letter?

A. I don't think there was anyone but Mr. French and myself.

Q. Was Mr. French present? A. Yes, sir.

Q. Are you quite certain of that?

A. Yes, sir.

Q. Was that letter destroyed before your husband and sons went to the Redding Land Office, or after?

A. I cannot say as to that, I think it was destroyed before.

(Testimony of Mrs. F. M. French.)

Q. Are you quite positive it was destroyed before, Mrs. French? A. I think it was.

Q. And notwithstanding that the letter was destroyed before they went to the Redding Land Office, they did go there? A. What is that?

Q. They did go to the Redding Land Office?

A. Yes, sir.

Q. After the letter had been destroyed?

A. I think it was after.

Q. Did that letter contain a description of any land?

A. I don't think it did in particular—a description. He asked them to take land.

Q. You are positive as to the time that you burned the letter, that it was before they went to the Redding Land Office? A. I think it was.

Q. Now, Mrs. French, have you talked over with your husband as to the contents of that letter since you destroyed it?

A. I don't know. I think it has beeen spoken of.

Q. Before you testified here, before giving your testimony here, have you talked with your husband concerning the contents of that letter?

A. I cannot say just whether I have or not.

Q. Have you talked with him at all about what testimony you would give here?

A. No, sir, I don't think I have.

Q. You have not talked, as a matter of fact, with any member of your family about this case?

A. No, sir, I wanted my family to come in and

(Testimony of Mrs. F. M. French.)

have their say straight. I did not want to talk with them about it.

Q. But you destroyed at the same time, you say, other letters? A. Yes, sir.

Q. Relating to that same transaction?

A. It was business letters from Dr. Dwinnell to my husband, concerning their business.

Q. How many of those letters did you likewise destroy?

A. I could not say just how many.

Q. As many as half a dozen?

A. It may have been so many and might have been not so many.

Q. Do you remember the contents of those letters that you destroyed? A. No, sir.

Q. Did any of those letters that you also destroyed ask your sons or your husband to do anything which in your judgment was wrong?

A. I could not say as to that.

[Testimony of Arthur Jacquette, for the United States.]

ARTHUR JACQUETTE, called as a witness for the United States, being duly sworn, testified:

Mr. BLACK.—Q. Where do you live, Mr. Jacquette? A. Davenport, Washington.

Q. Where were you living in the months of September and October 1906?

A. In Siskiyou County, employed by the Wetzel Lumber Co.

Q. What were you doing there?

A. Driving a team.

(Testimony of Arthur Jacquette.)

Q. Do you know Dr. Dwinnell? A. I do.

Q. Do you know the defendant Gilpin?

A. I do.

Q. And Deter? A. I do.

Q. Did you have any business arrangement with any of those people in the month of September and thereafter, in relation to certain pieces of land?

Mr. SCHLESINGER.—We have no objection to the witness stating all he knows, but we do object to the question as at present put.

Mr. BLACK.—That is merely preliminary.

The COURT.—I overrule the objection.

A. Yes, sir.

Q. With which one did you first have any conversation? A. Mr. Gilpin.

Q. When was it?

A. It was about the first of September, 1906.

Q. Just relate the entire transaction, Mr. Jacquette?

A. I was at the mill of the Wetzel Lumber Company, and Mr. Gilpin, came to me and asked me if I wished to make $200, and I told him I did, and he told me if I would go out and stop or squat on a certain piece of land there for a term of two weeks, build a cabin and put up some improvements, that that amount would be paid me. I objected somewhat to that there. I did not think I would be paid for any such service as that, and he told me he would stand good for the money, and see that I got that amount, $200.

Q. What did you do?

(Testimony of Arthur Jacquette.)

A. A few days after I met Mr. Gilpin, at the same place, and he took me out and showed me this land, and posted notices on it that I intended to take that land as a homestead and was stopping there. A short time after I went back up there, and with the help of Charles H. Freer, and Frank Ritchie, put up a cabin on that land, I helped them to build theirs and they helped me to build mine.

Q. Go on and tell the entire transaction. What next happened? Did you stay there any time at the cabin?

A. Not at that time. Later about a week, or such a matter later, I went out there and stayed one night. I had a camp outfit sent to me.

Q. You stayed just one night?

A. One night.

Q. Then what happened? A. That was all.

Q. That was all at that time? A. Yes, sir.

Q. Now, what was the next step that was had in relation to any of the defendants?

A. The next transaction was, about the 10th of September, I met Mr. Dwinnell, as I was going into Montague, coming out in a buggy. He handed me an affidavit in an envelope addressed to the Land Office at Redding, together with 50 cents, to go before a notary and swear to it, and mail at the Land Office at Redding.

Q. Did he say anything to you?

A. He just handed me this here paper, together with the money and told me what to do with it.

(Testimony of Arthur Jacquette.)

Q. I hand you what purports to be an Homestead Affidavit on form 4-063, and I ask you if that is the identical paper handed to you by Dr. Dwinnell on the road some few miles out from Montague?

A. It is.

Q. Were you going towards Montague, at the time? A. I was going into Montague.

Q. What did you do with that paper?

A. I went before G. H. Chambers, the Notary, at Montague, made affidavit to it and mailed it at Redding.

Q. And mailed it in the envelope that was already stamped and addressed?

A. I am not certain if it was stamped or not. It was already addressed.

Mr. BLACK.—We offer this document in evidence as Government's Exhibit No. 10.

* * * * * * * * *

Mr. BLACK.—Q. Whom next did you see in reference to this particular piece of land?

A. The next was in Montague when I started for Redding.

Q. Who told you to go to Montague?

A. I was in Montague, and Frank Ritchie told me we would go down there in a few days. I was driving team for Wetzel at the time. I turned my team over to him. I went in there, and there I met Mr. Gilpin. He gave me money to buy two tickets as far as Dunsmuir, and from there I bought my own ticket on into Redding.

(Testimony of Arthur Jacquette.)

Q. Where did you go when you arrived at Redding? A. To the Temple Hotel.

Q. Who kept that? Kleinsmith?

A. Kleinsmith, yes, sir.

Q. Who went with you from Montague, to Redding?

A. Mr. Gilpin, and I, and I believe that Frank Ritchie and Charles Freer were with us. I am not certain.

Q. How long were you at the hotel before you took your place in line?

A. I should think about two days.

Q. Did you have any conversation with Gilpin or anybody else as to what you were going to Redding for? A. No, sir.

Q. Did you know what you were going for?

A. Yes, sir, I thought so. I thought I knew.

Q. At what point of time did you receive the paper that you filed, if you did file it in the Land Office? I hand you as part of that question application 4815 in duplicate and ask you to answer the question in reference to that paper.

A. I received it at the Temple Hotel.

Q. Who gave it to you?

A. There were several of them on the table there, and I don't know as anybody gave it to me. I am under the impression I just went and got it, picked it off of the table. Several of us were in there fixing up our applications at the same time.

Q. Do you know who wrote that out, filled that out? A. Yes, sir.

(Testimony of Arthur Jacquette.)

Q. Who did it?

A. Mr. Deter. Rex Deter wrote this out here according to my own description of the land, my own description of the numbers and sections and subdivisions.

Q. What land did you apply for?

A. The southwest one-quarter of Section 34, Township 45 North, Range 3 West as near as I recollect.

Q. This is the township map. It would be relatively in that position (pointing)?

A. I think so.

Q. When Mr. Deter filled that out, what did he do with it?

A. Either handed it to me or else I took it up off of the desk there.

Q. What did you do with it then?

A. I put it in my pocket and kept it until such time as I would use it at the Land Office.

Q. When did you get in line—the filing was on the 31st of October—when in reference to that?

A. I believe it was on the morning of the 29th.

Q. And did you stay right in line until you made your filing?

A. No, sir, we left at times and went out to get meals, and such things as that.

Q. On the morning of the 31st, did you go to the Land Office—did you go into the Land Office?

A. Yes, sir.

Q. Tell what happened there?

(Testimony of Arthur Jacquette.)

A. I went in and filed this paper, here, this affidavit, with the Receiver, Mr. Leininger.

Q. And you swore to it? A. Yes, sir.

Q. Now, Mr. Jacquette, before you went into the Land Office, did you have any conversation with any of the defendants as to expenses in the office?

Mr. VAN DUZER.—We object to that as immaterial, and irrelevant, "with any of the defendants."

The COURT.—I will overrule the objection.

Mr. VAN DUZER.—I will take an exception.

A. Before I went into the Land Office, someone, I don't remember who it was, came to me and said—

Mr. TAYLOR.—That is clearly vicious and irrelevant, if your Honor please.

The COURT.—I think that is so.

Mr. BLACK.—Q. If it was not one of the defendants I do not want you to state what was said, unless it was either Dr. Dwinnell, Mr. Deter, or Mr. Gilpin.

A. It was not either one of the three.

Q. Not any of those? A. No, sir.

Q. Just immediately before you got into the Land Office, did any of the defendants come up to you and speak to you? A. Yes, sir.

Q. Which one? A. Mr. Gilpin.

Q. What did he say and do?

A. Before I went into the Land Office, my papers were taken out to be looked over by someone, and when they were brought back, Mr. Gilpin came to me—

Q. Keep your voice up.

(Testimony of Arthur Jacquette.)

A. Just before I went in the office, Mr. Gilpin came to me and took my papers out, and said, "There will be some money in your pocket when you go in there; use it if necessary." My papers were brought back to me, and with them a homestead filing, a homestead application. They were both handed to me with $20.

Q. By whom?

A. By Mr. Gilpin to use in there if necessary. I did not need the money, and consequently did not use it, and handed it back to Mr. Gilpin.

Q. Did you have occasion to use your homestead filing at all? A. I did not.

Q. Was anything said by Mr. Gilpin, as to under what contingency you should use it?

A. Yes, sir.

Q. What did he say?

A. In case there were too many ahead of me; in case one of those men should file a timber claim on this land, where I had been stopping and built my cabin, I was to file a homestead application over it.

Q. Did he state to you at the time that the homestead application always got the preference?

A. Always had the preference.

Q. And in conjunction with that, he gave you the $20, you have said, to make the filing in case it became necessary? A. Yes, sir.

Mr. VAN DUZER.—I think that is certainly the worse kind of leading of the witness. I object to it as not a fair way to ask the question. Mr. Black

(Testimony of Arthur Jacquette.)
says, "Did he not do this; did he not tell you this," and the witness says yes or no.

Mr. SCHLESINGER.—My objection is that it has no more to do with the case than Gulliver's Travels.

The COURT.—I will overrule the objection. Let it remain as it is.

Mr. VAN DUZER.—It is his own witness and he ought not to lead him.

Mr. BLACK.—Q. After having been to the office, later on did you have any business with any of the defendants in relation to this land and the relinquishment of it?

Mr. SCHLESINGER.—I object to any testimony as to subsequent transactions. Any transaction prior to the making of the locations would be admissible.

The COURT.—It is admissible as against some of the defendants, that is, if it is a relevant fact.

Mr. SCHLESINGER.—I think Mr. Black ought to specify the defendant.

Mr. BLACK.—Q. Did you have any dealings with Dr. G. W. Dwinnell in reference to getting your relinquishment for that land?

Mr. SCHLESINGER.—Objected to as immaterial, irrelevant and incompetent, and occurring at a time long subsequent to the taking up of the land by the witness, and hence is not inhibited by the law.

The COURT.—The objection is overruled. Testimony of that character is relevant against the defendant Dwinnell in my judgment.

(Testimony of Arthur Jacquette.)

Mr. SCHLESINGER.—We will take an exception.

A. I had no transaction with him until time of relinquishment.

Mr. SCHLESINGER.—In view of that testimony, I ask that the prior statement be stricken out—all his prior statements on that subject.

The COURT.—Let it remain.

Mr. BLACK.—Q. What occurred then?

A. We were in Gagnon's saloon, and Dwinnell said to me, "Now, if you are ready we will go down and fix up that business."

Q. Go on and tell what occurred then?

A. We went down to his office, I believe Gagnon went with us. When we got down there they gave me $180, Gagnon's check for $180, and then we went back up to the saloon, Gagnon and I, and he gave me $20, in currency, for my relinquishment.

Mr. SCHLESINGER.—Q. Who gave it to you?

A. Gagnon gave me $20, the $180 check Gagnon wrote out, Dr. Dwinnell picked it up and handed it to me, and said, "I believe that is right, I believe that is what you expected to get. I told you it was."

Q. When you went into the Land Office, and swore to that application, did you know that the statement was not true? A. I did.

Mr. BLACK.—We offer this as Government's Exhibit No. 11.

* * * * * * * * *

(Testimony of Arthur Jacquette.)

Cross-examination.

Mr. SCHLESINGER.—Q. Mr. Jacquette, what is your age?

A. I am thirty years old.

Q. Were you born in Siskiyou County?

A. I was born in Oregon.

Q. Who told you to go to Redding? If you cannot answer that question quickly, I will ask you if you know a man named Ritchie?

A. Yes, I know a man named Ritchie.

Q. Is not Ritchie your brother in law?

A. Yes, sir.

Q. Did he not tell you to go to Redding to take up this land? A. No, sir, Ritchie did not.

Q. What did Ritchie tell you to go to Redding for?

A. Ritchie never told me to go to Redding.

Q. Did you not testify ten minutes ago on direct examination that F. M. Ritchie—is that his name?

A. F. W.

Q. —told you to go to Redding Land Office?

A. I believe I testified that Ritchie said, "We will go." Something to that effect.

Q. Did you not say Ritchie told you to go to Redding; yes or no?

Mr. BLACK.—I don't think he did.

Mr. SCHLESINGER.—The record will show that he said it. Turn back to that portion of the testimony, Mr. Reporter, and see.

The COURT.—Let the record remain, and read it at some other time.

(Testimony of Arthur Jacquette.)

Mr. SCHLESINGER.—I think that is more satisfactory.

Q. Did you go to the Redding Land Office with Mr. Ritchie, your brother in law?

A. I went with Mr. Ritchie, and Gilpin, and Charles Freer.

Q. Did you pay a portion of your railroad fare?

A. I did.

Q. Did you have a single word with Dr. Dwinnell or with any of these defendants with reference to this affidavit before you made it? Yes or no.

A. No, sir.

Q. Did Dr. Dwinnell tell you, or did any one of these defendants tell you to make a single false statement before the Land Office at Redding, California? Yes or no. You said you had not a word with them. Now, bear that in mind in answering this question, if you will? A. I did not.

Q. Did you ever read this affidavit before you made it? A. I did.

Q. And on October 31st, 1906, up to that time, did you have any conversation with any one of the defendants with respect to an agreement or contract whereby the title you would secure should go to their benefit?

A. I had a talk with Mr. Gilpin in his place of business.

Q. That is the talk you have given these men?

A. It is not.

Q. What talk did you have Mr. Jacquette?

(Testimony of Arthur Jacquette.)

A. Told him I did not like that transaction; that it looked to me like straight perjury. He told me if I kept my mouth shut it would be all right.

Q. Yet, knowing of this conversation, and knowing this would be perjury, you went to the Land Office and made this affidavit? A. I did.

Q. Did you tell the Register or the Receiver of that Land Office, that a single word contained in this document was untrue? A. No, sir.

Q. Did you complain to anybody there that you were compelled to commit the crime of perjury?

A. I did not.

Q. As a matter of fact, have you ever made a conveyance of this land to any one of these defendants?

A. Only a relinquishment.

Q. Did you relinquish this land to any one of these defendants, or did you relinquish the land back to the Government?

A. I relinquished to the Government.

Q. The relinquishment bears no date. Do you remember when it was that you made this relinquishment?

A. It was on or about from the 15th, to the 20th of November, 1906.

Q. It was a month after you had made your location, or thereabouts? A. Yes, sir.

Q. Mr. Black asked you if you left the line, and you said you did. On leaving the line, did you not put somebody there in your place, so that you could retain your position? A. Usually.

(Testimony of Arthur Jacquette.)

Q. Was that not the custom amongst the 150 men in line? A. It was.

Q. To leave the line, and put substitutes in their place, and pay those substitutes. That was the custom, was it not? A. Yes, sir.

Q. As a matter of fact, Mr. Jacquette, did you not agree to pay Mr. Gilpin, a certain amount for locating you on this land? Yes or no.

A. Well, yes.

Q. How much did you agree to pay him?

A. In case that the land became mine, and I got a title to it, I was to pay Mr. Gilpin, $150. It was a verbal contract between the two of us there.

Q. Did you not know that you could obtain title to this land by paying the Government price? Had you any doubt about it?

A. I had a doubt about it at that time.

Q. Did you have a doubt about your ability to borrow the money to pay the Government? Was that not your doubt?

A. I did not have the money.

Q. Now, Mr. Jacquette, tell these twelve men how often you tried to borrow the Government price for this land so as to enable you to gain title?

A. I never at no time or place tried to borrow one cent to obtain title to this land.

Q. Did you not go among merchandise dealers of Montague, and into the bank, and amongst your acquaintances at least a dozen in number, and try to borrow the purchase price of this land?

A. Most emphatically I did not.

(Testimony of Arthur Jacquette.)

Q. Is it not a fact that it was not until you failed to borrow the purchase price that you then made up your mind to relinquish the land to the Government?

A. It is not a fact.

Q. You had no money of your own?

A. No, sir.

Q. If you could have got the land for $50, you could not have paid the purchase price at that time?

A. Yes, sir, I could.

Q. You could have raised $50. How much money did you give to your brother in law, Ritchie, in this transaction?

A. I never gave him a cent.

Q. Did Dr. Dwinnell ever hand you a single five cent piece? A. No.

Q. You did know John D. Gagnon, did you not?

A. Yes, sir.

Q. John D. Gagnon, is dead, is he not?

A. He is.

Q. John D. Gagnon, handed you, you say, a check for $180? Was that check given to you before or after you filed your relinquishment?

A. Immediately after I filed my relinquishment.

Q. After you put your name on the relinquishment was it, that you received your money?

A. Yes, sir, Dwinnell, wrote out the relinquishment. I signed my name and he handed me the check for $180.

Q. Is that the relinquishment appearing on the ordinary blank furnished by the Government (hand-

(Testimony of Arthur Jacquette.)

ing)? Do you know whether or not that is your signature? A. It is.

Q. There is no doubt about it?

A. Not in the least.

Q. In going into the Temple Hotel, you found on the table a certain number of blanks did you?

A. I found these in one of the rooms where the boys were stopping.

Q. That was the Hotel? A. Yes, sir.

Q. Did you take one of those blanks and fill it up?

A. We made out our applications there together with Mr. Deter.

Q. Who was it that furnished to Mr. Deter, the description to go into the application?

A. I did myself.

Q. Where did you get the description from?

A. I got it from Mr. Gilpin.

Q. Did you know the land yourself?

A. I did.

Q. Did you go on the land yourself?

A. I did.

Q. Why did you go on the land yourself if you intended simply to go to the Land Office to commit perjury?

A. I went on the land there in order to get $200 from Mr. Gilpin, for that service.

Q. Did you go on the land so as to be able to swear to the Land Office that you had personally inspected the land?

A. I went on that land there, posted them notices, and stopped there, for a certain length of time. I

(Testimony of Arthur Jacquette.)

had no intention at that time of swearing to anything.

Q. Did Mr. Gagnon, remain there with you?

A. No, sir.

Q. You say that when you stopped on that land, you had then no intention of swearing to anything?

A. No, sir, I did not.

Q. Did you go on the land simply out of idle curiosity?

A. I went on the land with Mr. Gilpin, for the special reason, that he told me that was all that was necessary, to go out there, and stay two weeks time, and make a settlement there. I would not have to file on anything, and would lose no rights. There would have to be no filing done.

Q. It was your intention on securing title from the Government to pay Mr. Gilpin $150?

A. I had no intention of ever securing title.

Q. Did you not testify five minutes ago, that you had promised Mr. Gilpin, in the event of your gaining title to that land, you would give him $150? Yes or no.

A. Yes, sir, I promised him. Mr. Gilpin, knew I had no intention of ever gaining title to it.

Redirect Examination.

Mr. BLACK.—Q. What did Gilpin say to you in regard to that Homestead matter? How was the $150 mentioned? That is what I want to get at.

A. This $150 was not mentioned until after we had left the mill, and had got about half way out there, according to my recollection.

(Testimony of Arthur Jacquette.)

Q. What did he say then?

A. He said he would charge me $150, for locating me on that land there, in case I got title to the land.

Q. What did you say? A. I agreed to it.

Q. Did he say anything as to why he had told you that?

A. No, sir, he did not say why he had told me that.

Q. Did he ever at any time remention the subject?

A. Not until after our *filing* were made, and relinquishment.

Q. Then what did he say?

A. He recalled it to my memory that I had made such an agreement with him.

Q. And what did you say?

A. I told him I remembered the transaction, or something to that effect.

Q. What did he say?

A. I don't remember that. That passed from my mind.

Q. Is this land that you built your cabin on, and for the taking up of which you were to receive $200, the same, identical land that you have mentioned, the southwest quarter of the 34th section, 45 north, 3 west? A. It is.

Q. And is it that particular land that Gilpin told you to keep your mouth shut about? A. It is.

[Testimony of C. W. Leininger, for the United States.]

C. W. LEININGER, called as a witness for the United States, being duly sworn, testified:

Mr. BLACK.—Q. What is your business?

A. Register of the United States Land Office at Redding, California.

Q. How long have you been Register?

A. Since March 21st, 1906.

Q. Were you acting there all through the month of October, 1906?

A. I was, to the best of my recollection.

Q. Do you remember the occasion of certain Forest Reserve lands being thrown open for Application to purchase on the 31st day of October, 1906?

A. I do.

Q. How many applications were taken that day?

A. All of the applications submitted at that time, at the time of this opening, were not received on the 31st. If my recollection serves me rightly, we had about 131 the first day. I recall distinctly, there were 257 applicants in line, at the time, that the lands were thrown open to entry.

Q. There are one or two applications, one that I have in my hand here that does not purport to be signed by you. I will ask you, if you in that case, did administer the oath?

A. I did in every instance.

Q. And that is the original document that you, yourself, handled? A. Yes, sir.

(Testimony of C. W. Leininger.)

Q. Though it is not signed, the oath was in fact administered? A. It was.

Mr. TAYLOR.—Which one is that?

Mr. BLACK.—In reference to Prather.

Q. If there should happen to be any other one unsigned, the same answer would apply?

Mr. SCHLESINGER.—I admit in every instance, Mr. Leininger administered the oath.

Mr. BLACK.—Q. Do you know Dr. Dwinnell?

A. I do.

Q. How long have you known him?

A. Since about the fall of 1902.

Q. Do you remember whether Dr. Dwinnell personally filed in the Land Office any relinquishment in reference to any of the papers either of Prather, any of the French boys, or Frederick M. French, or Jacquette?

Mr. SCHLESINGER.—I object to that as being immaterial, incompetent and irrelevant.

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—We will take an exception. And furthermore, that the records of the office is the best evidence.

Mr. BLACK.—If you have the records here and can show it—

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—We will take an exception.

A. I think that Dr. Dwinnell, at different times in the course of business before the office, filed certain relinquishments, but whether or not he filed the

(Testimony of C. W. Leininger.)
relinquishments in the cases of the applicants referred to there on the desk, I cannot say.

Q. Is there any record in your office, that would disclose that fact?

A. No, sir, we have a record of the filing of relinquishments in each particular entry, but the Department of the Interior does not require that the name of the filer be made a matter of record. Anyone may file a relinquishment.

Q. Have you any record by which you could show who took the land or applied for the identical land covered by these various applications when the relinquishments were put in?

Mr. SCHLESINGER.—I object to the question as irrelevant, immaterial and incompetent. The record would be the best evidence. As a matter of course, when the land is relinquished to the Government anyone may locate that land. That is the purpose of the relinquishment.

The COURT.—I overrule the objection.

Mr. SCHLESINGER.—I will take an exception

Mr. BLACK.—Q. Is there any record that would show that?

A. The tract book I have here from the Redding Office shows the entries which were placed of record immediately on the filing of the relinquishment on the applications referred to.

Q. I will ask you to get the tract book, and I will run over these. I will just hand you the applications here of Jacquette, B. F. French, Frederick M. French, Clarence M. Prather, James Frederich

(Testimony of C. W. Leininger.)

French, Samuel Leonard French, and I will ask you to take them, and if you have any record, tell us who, immediately upon the filing of the relinquishment, applied for the identical land mentioned in the relinquishment?

A. In the application of Clarence M. Prather,—Do you wish the date of the cancellation of the entry?

Mr. SCHLESINGER.—Q. Yes. Please give all those dates.

A. That entry was cancelled by relinquishment at 9 o'clock A. M. December 3d, 1906, at which time State Indemnity Lieu Selection 4629, Register & Receiver's No. 972, was filed for the land embraced therein.

Mr. TAYLOR.—Q. By whom?

A. By the State of California.

Mr. SCHLESINGER.—Q. That title still remains in the State of California?

A. It does, as far as I know.

Mr. BLACK.—Q. Do you have any record there showing for whose benefit the application was made by the State?

A. There is no such showing made in any Indemnity State Lieu Selection. The business is transacted entirely in the name of the State Surveyor General through the State Office. No individual applicant's name is ever given in any Lieu Selection.

Q. That refers to all those applications?

A. Yes, sir.

Q. Is it impossible for you to name from your

(Testimony of C. W. Leininger.)
records the parties who actually caused the State to make the application so far as your record shows?

A. Yes, sir.

Mr. SCHLESINGER.—Q. Your records do show in whose name the title now rests?

A. So far as our records show, as a matter of fact the title still rests in the United States, because the selections have not been finally approved by the Department of the Interior.

Mr. SCHLESINGER.—Q. It has not been listed?

A. Not been listed for approval, as it is technically termed.

Mr. BLACK.—Q. They have been held for cancellation?

Mr. SCHLESINGER.—I think the witness ought to testify from the records, as counsel has called for them?

A. As far as I know they have not.

Mr. BLACK.—If it is possible for you to tell, that is all I desire to question you about.

Mr. SCHLESINGER.—It will not be impossible for him to tell something about this.

Cross-examination.

Mr. SCHLESINGER.—Q. I will ask you to examine these records. What are these records that you have here, by the way?

A. This is the tract book of certain townships in the Redding Land District.

Q. Does that record show the disposition of the lands referred to in the Prather Application?

(Testimony of C. W. Leininger.)

A. It does.

Q. I will ask you to examine this book under the Prather entry and tell these twelve men whether you find appearing on that page the name of Dr. G. W. Dwinnell, as the owner of that tract of land?

Mr. BLACK.—I object to that as immaterial.

The COURT.—Certainly. The witness has already said there is nothing in there that shows any further than what he has already read.

Mr. SCHLESINGER.—With that statement we will not pursue it.

Q. We will ask you now to refer to Arthur W. Jacquette entry under date of October 31st, 1906. Do you find the name of Dr. G. W. Dwinnell, or any one of these defendants, in connection with that entry? A. I do not.

Q. I will ask you the same question with respect to the entry of Benjamin Franklin French?

A. The answer will be the same.

Q. Frederick M. French?

A. The same answer applies to all.

Q. James Frederick French. The same answer?

A. Yes, sir.

Q. And the same answer to Samuel Leonard French? A. Yes, sir.

Q. Now I will call your attention, to this blank relinquishment in printed form. Do you recognize that as the official blank used for relinquishment purposes by the Government, (handing)?

A. I do.

(Testimony of C. W. Leininger.)

Q. You, in the course of your official business, have filed many hundreds, and perhaps thousands of these same relinquishments, have you not?

A. A great many.

Q. They are filled out not only personal relinquishing, but by land attorneys, and outsiders, are they not? A. Yes, sir.

Q. There is nothing mysterious in a man bringing into your office a relinquishment of public lands, is there?

A. No, sir, unless the particular entry relinquished was involved in contest proceedings, wherein a supposed third person, not a party to the litigation, might present a relinquishment, then we would have to look into it.

Q. But that does not occur in these cases?

A. No, sir.

Q. These blanks are procurable by anybody, are they not? A. They are.

Redirect Examination.

Mr. BLACK.—Q. You have been asked as to blank relinquishments. There are certain papers here connected with these exhibits, that were handed to you a little while ago, that have two relinquishments. Take this one of Prather, for instance. Can you tell me why there were two relinquishments in that instance?

A. The Department of the Interior prefers, to have relinquishments, as well as other set forms or instruments, on the form prescribed by it, and for that reason where it is possible to procure it, or

(Testimony of C. W. Leininger.)

where they are not in the form prescribed by the Department, we have usually insisted on the applicant furnishing the paper form.

Q. Do you know whether you had any correspondence or conversation with Dr. Dwinnell, in regard to furnishing the blank relinquishments, that is, the relinquishment on the blank form used by the Department in these particular instances? I also hand you in connection with this matter, the matter of Frederich M. French, which has a written relinquishment, the matter of Benjamin Franklin French, which has two, one in writing, and the other on the blank, and also James Frederick French, and Samuel Leonard French, which has two each, and ask you if you remember having any conversation or correspondence with Dr. Dwinnell, in regard to these matters?

Mr. SCHLESINGER.—If there is any correspondence, that is the best evidence. If there was any conversation, he can testify to it.

The COURT.—Answer the question.

A. I recall that there was some conversation over it, and the substance of it was to the effect that the relinquishments were not in the form prescribed by the Department, and I requested the Doctor to procure and file proper relinquishments, as near as I now remember.

Mr. BLACK.—That is the case for the Government.

[Testimony of G. H. Chambers, for the Defendants.]

G. H. CHAMBERS, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Judge, where do you live, please?

A. I live in Montague, Siskiyou County.

Q. How long, Judge, have you been a resident of Siskiyou County?

A. Something over 20 years.

Q. Do you occupy any official position in that country?

A. Yes. I am Justice of Peace and Recorder of the Town Court.

Q. How long, Judge, have you held the position of Justice of the Peace?

A. Pretty nearly 20 years.

Q. About 20 years?

A. With the exception of one year.

Q. Are you also connected with the newspapers there, the "Montague Messinger"?

A. I am the publisher and editor of that paper.

Q. Do you know a family in that country, without my having to enumerate all the names of the male persons, by the name of French, the French family? A. I do.

Q. That is you know Mr. French, Sr., and his sons? A. F. M. French and his sons.

Q. How long have you known that family in that country? A. About 7 or 8 years.

(Testimony of G. H. Chambers.)

Q. Do you know, Judge, the general reputation of the male members of that family for truth, honesty and integrity? A. I do.

Q. Is that general reputation good or is it bad?

A. It is bad.

Q. Knowing that reputation as you do, Judge, would you believe, any one of them under oath?

A. I would not where they had any interest or feeling.

Q. Did you ever come in contact, Judge, with the Senior French, in connection with any official duties upon your part? A. Yes.

Mr. BLACK.—We object to that.

The COURT.—You need not answer that question.

Mr. SCHLESINGER. — Exception. You may cross-examine.

Cross-examination.

Mr. BLACK.—Q. Do you have any other occupation? A. Why, I am a druggist.

Q. Are you a lawyer?

A. No, sir, I am a Notary Public.

Q. A Notary Public in addition? A. Yes.

Q. Do you owe Dr. Dwinnell any political favors?

A. No, sir.

Q. He never helped to nominate you for office, did he? A. No.

Q. Are you the Judge Chambers, who stated on the street of Montague, that in as much as the road fund was getting a little low and that you would have to provoke Mr. French to strike somebody in

(Testimony of S. L. Williams.)

order to replenish the fund with the fine you would impose upon him? A. No.

Q. You have a personal enmity towards Mr. French?

A. Not in the least, never had any trouble with Mr. French.

[Testimony of S. L. Williams, for the Defendants.]

S. L. WILLIAMS, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Mr. Williams, where do you live, please? A. Siskiyou County.

Q. How long have you lived in that county?

A. About 20 years.

Q. What is your occupation, Mr. Williams?

A. Rancher.

Q. You have a large ranch there, have you? How many acres, about?

A. Between 700 and 800 acres.

Q. Under irrigation? A. Yes, sir.

Q. Do you know, Mr. Williams, the male members of the French family?

A. Yes, sir, they have all worked for me.

Q. They have all worked for you, how long have you known them, please?

A. They worked for me in 1898, 1899, and 1900.

Q. How long have you known them up to the present time? A. Since 1898.

Q. Was Mr. French, Senior, also in your employ?

A. Yes, sir.

(Testimony of S. L. Williams.)

Q. Do you, know, Mr. Williams, the general reputation of the male members of the French family for truth, honesty and integrity?

A. I do.

Q. Is that general reputation in that community good or is it bad? A. Bad.

Q. Knowing it as you do and knowing them as you do, would you believe any of them under oath?

A. I would not.

Cross-examination.

Mr. BLACK.—Q. When did you discover this bad reputation, Mr. Williams?

A. During the time they were working for me.

Q. Was that in 1898?

A. 1899 and along in there, yes.

Q. Notwithstanding that fact you re-employed them for the summer of 1900, did you?

A. Yes, sir.

Q. During that time you also hired from Mr. French, two spans of horses and two wagons, didn't you? A. Possibly, yes.

Q. And when you made a settlement with him you offered him two bits a day for the whole outfit, didn't you? A. I did not.

Q. Didn't Mr. French tell you on that occasion that he could thrash you if you were not on your land for insulting him in such a manner as that and isn't that the cause of your hostility towards him?

A. No, sir.

Q. Whom have you ever heard state that Sam French's reputation was not good?

(Testimony of S. L. Williams.)

A. The constable in Montague; I don't recollect his name.

Q. What did he say about him? Did he say anything about his reputation for truth, honesty and integrity? A. Well, yes.

Q. What did he say?

A. He said that those people had the row there at the circus and he said he would not believe them under oath.

Q. Referring to whom?

A. Referring to Sam French, I think, in that row.

Q. That is the constable that has been instrumental in arresting the Frenchs a number of times?

A. No; I think that is another one.

Q. Who else did you hear?

A. It is my own idea about it, not what other people said.

Mr. BLACK.—Then I move that the answer of the witness to the whole question be stricken out, as it is not shown he is competent to testify to the general reputation of the French family, he has given his own private opinion.

Mr. SCHLESINGER.—I resist and deny that motion, that will go to the weight of the testimony.

The COURT.—The motion will have to be granted.

Mr. SCHLESINGER.—Then I will re-examine him, with your Honor's permission.

Q. Mr. Williams, have you ever heard anybody outside of the constable discuss the general reputation of these men, the French family?

(Testimony of S. L. Williams.)

A. I have.

Q. Now without your being compelled to mention names for no one can readily mention names, how many would you say that you have discussed it with? A. About everybody.

Q. In other words, the reputation of these people are very generally known throughout the country?

A. Yes, sir.

Mr. SCHLESINGER.—We submit the testimony should be allowed to stand.

The COURT.—It will stand on that.

Mr. BLACK.—Q. Then will you be kind enough to name any other persons you have discussed this matter with as to their truth, honesty and integrity?

A. Well, I have discussed this matter with Mr. Luttrell, the District Attorney of Siskiyou County.

Q. Another politician of the county?

A. Mr. Luttrell is on the opposite party to mine.

Q. Who else talked about these people?

A. Mr. Walcutt, the postmaster at Mayten. Mr. Wadsworth, the president of the Siskiyou County Bank.

Q. Which one was he talking about?

A. The whole family, he had them employed on his ranch.

Q. Did he mention them by name?

A. Well, he had the whole family there, they went from my ranch to his. I have an alfalfa ranch and he has a wild grass ranch and after I got through harvesting my alfalfa they went to the Wadsworth ranch.

(Testimony of S. L. Williams.)

Q. Did you send to Yolo County for the French family to come and work for you?

A. No, sir. They came by my place and I needed help, and I hired them.

Q. Did you not send to Yolo County to have them come up the second year? A. I think I did.

Q. Did you send to Modoc County for them?

A. I never sent to Modoc County.

Mr. SCHLESINGER.—Q. You have been asked, Mr. Williams, about some personal quarrel between you and Mr. French—

The COURT.—You need not answer that.

Mr. SCHLESINGER.—Will your Honor not permit me to finish that question?

The COURT.—No; call your next witness.

Mr. SCHLESINGER.—Exception.

[Testimony of M. V. Purdy, for the Defendants.]

M. V. PURDY, called as witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Mr. Purdy, where do you reside, please? A. Montague.

Q. How long have you lived in Siskiyou County?

A. About 20 years off and on.

Q. Do you occupy any official position in that county Mr. Purdy?

A. Town Marshal.

Q. You are a property owner and a man of family, are you? A. Yes.

Q. You occasionally like the balance of good citizens get into politics once in a while?

(Testimony of M. V. Purdy.)

A. Yes, sir.

Q. Do you know the male members of the French family? A. Yes.

Q. How long have you known them, Mr. Purdy?

A. About ten years.

Q. Officially and privately?

A. About ten years.

Q. Do you know, Mr. Purdy, the general reputation of the combined male members of the French family in that community for truth, honesty, and integrity? A. Yes, sir.

Q. Is that general reputation good or is it bad?

A. Bad.

Q. And knowing it as you do would you believe them under oath?

A. No, sir; I would not.

Q. In the month of February, 1908, Mr. Purdy, in the town of Montague, county of Siskiyou, this State, did you have a talk with French Senior concerning Dr. Dwinnell? A. Yes, sir.

Q. Did you have any such conversation with Mr. F. M. French, at the time and place I have indicated?

A. Yes.

Q. What was said in that conversation?

A. Why him and I was standing out there talking and all at once he says "I would like to punch that old son-of-a-bitch in the face," and I says, "Who," and he says, "Dr. Dwinnell," and then I told him, "You better not do it because if you do he is liable to kill you."

Q. What else was said?

(Testimony of M. V. Purdy.)

A. He says, "I would be willing to serve the rest of my days in the penitentiary if I could put that old son-of-a-bitch in there."

Q. Have you any interest of any kind or character in this controversy?

A. No; I have not.

Cross-examination.

Mr. BLACK.—Q. Do you owe Dr. Dwinnell any political favors? A. I do not.

Q. Did he ever assist you in getting a nomination or appointment? A. No, sir.

Q. Not at any time? A. No, sir.

Q. How long have you been Town Marshal?

A. About four months.

Q. What did you do before that?

A. I have a store there.

Q. Did French owe you any money?

A. No, sir.

Q. They pay their bills?

A. Well, they always paid me.

Q. Isn't it a fact that what you are testifying about is the fact that the Frenchs are willing to fight if anybody pitches on them and imposes on them?

A. No, they are always picking up rows themselves.

Q. It is recognized throughout the country that they fight if necessary?

A. It is recognized throughout the country that they are always picking up rows.

(Testimony of M. V. Purdy.)

Q. Who did you ever hear speak of the reputation of any one of them?

A. Most everybody in Siskiyou County.

Q. That is a very general statement. Will you take, for instance, Benjamin Franklin French, whom did you ever hear say anything about him?

A. Well, I have heard lots of people. I don't know any particular one.

Q. Name somebody. You have come here to blast the reputation of a whole family. Now, I want you to come down and testify under oath as to the individuals that you have heard discussing the reputation of the Frenchs for truth, honesty and integrity?

A. You can hear lots of them. I never noticed any—I did not pay any attention to any in particular, who they were.

Q. Can you name a single individual?

A. The crowds, you can hear them talking about them.

Q. Can you mention a single individual?

A. Well, I never paid any attention to who they were.

Q. Then under oath you say you cannot name a single individual in Siskiyou County that you heard discuss Benjamin Franklin French's reputation for truth, honesty and integrity?

A. Yes, I can.

Q. Will you name him?

A. Well, sir, there is Mr. Hudson.

Q. Who is Mr. Hudson?

(Testimony of M. V. Purdy.)

A. H. H. Hudson, a merchant.

Q. What did he say about Benjamin Franklin French?

A. He said he was no good.

Q. When?

A. I don't remember what time.

Q. Can you fix it within a year?

A. Yes, in two or three years.

Q. Where? A. Montague.

Q. What year was it?

A. I don't remember the year.

Q. What month was it?

A. I don't remember that.

Q. What was the occasion for it?

A. Just talking about him.

Q. Now Sam French, did you ever hear about Sam French, anything said about him?

A. Yes, I heard them saying just the same thing as all the rest of them.

Q. Who?

A. I don't know the names of them.

Q. How many of them?

A. Some, I guess I can name them.

Q. Hudson is the only one you can name?

A. No, sir.

Q. I have not heard any other name.

A. Well, there is Tom Ritchie, John Gagnon.

Q. Gagnon, one of the defendants now dead?

A. There are numbers of them, of course I can't remember their names now.

(Testimony of M. V. Purdy.)

Q. Did you ever hear any single individual in your life state that any of the French family was dishonest? A. Yes, I have.

Q. Who?

A. Well, there is quite a number of them, Mr. Simon.

Q. Of whom was he talking?

A. I don't know just who they were now; I don't remember.

Q. Are you able now to mention any person in Siskiyou County or any other county that has said that the French boys are dishonest men?

A. Yes, sir.

Q. Will you name that person?

A. Not just the ones, but I heard them say they would not believe them under oath.

Q. You have answered under your oath that the general reputation of these men in that community for truth, honesty and integrity, was bad?

A. Yes, sir.

Q. Now, do you wish this jury to understand that under your oath cannot name a single person?

A. Yes, I can name them.

Q. Who is the person?

A. Well, sir, Judge Chambers is one.

Q. When was that?

A. I don't remember what time it was.

Q. What did he say?

A. I heard him say he would not believe them under oath.

Q. Did he say any of them was dishonest?

(Testimony of M. V. Purdy.)

A. I never heard him say any of them was dishonest, so far as the word "dishonest" was concerned.

Q. Is there any other person that you can dig up from the recesses of your memory? A. Yes.

Q. Who? A. George Wooster.

Q. Who is he? A. Hotelman.

Q. What did he say?

A. He said he would not believe them under oath.

Q. When was that?

A. It was along in this year sometime.

Q. What was the occasion for your talking about French?

A. I heard him talking about them.

Q. What was the occasion of it?

A. I don't know what they were doing.

Q. Where was it? A. I just overheard it.

Q. In any hotel or on the street?

A. On the sidewalk.

Q. What was the occasion for the conversation?

A. I don't know.

Q. Did you participate in the conversation?

A. No, I did not.

Q. Have you discussed this case with Dr. Dwinnell or any of the defendants?

A. No, sir, I have not.

Q. How did you come to be a witness down here?

A. I don't know, it just happened they wanted me to come.

Q. Did you tell anybody that you could testify that the reputation of the Frenchs was not good?

(Testimony of M. V. Purdy.)

A. No, I didn't.

Q. You did not. You were subpoenaed without having mentioned to a soul that you knew their reputation was bad. Is that true?

A. I suppose I was subpoenaed—I suppose he had me come down here and testify.

Q. Didn't you have some conversation with some person as to your being a witness down here?

A. Only with Mr. Simon.

Q. Who is Mr. Simon?

A. He is the cashier of the bank, he is a banker there.

Q. What did he say to you?

A. When I was talking about it I was telling him what French told me.

Q. Do you know how Mr. Simon transmitted your statement, did he talk to anybody about that?

A. I don't know.

Q. What I want to know, Mr. Purdy, how you came to be a witness?

A. Well, I don't know that.

Q. You don't know? A. No.

Q. Who is paying your expenses down here?

A. Dr. Dwinnell.

Q. How do you know that?

A. Because he gave it to me.

Q. Then you did talk to him?

A. I didn't talk to him.

Q. Whom did you talk to?

A. Mr. Simon was the only one I talked to.

Q. How did you get the money?

(Testimony of Arthur Simon.)

A. Dwinnell gave it to me.

Q. What did he say when he gave it to you?

A. "I want you to go down as a witness," and "I will pay your expenses."

Q. Then you did have a conversation with some one in regard to coming down here as a witness.

A. That is all.

Q. Didn't you say you did not talk to a soul before you came down here?

A. That is not talking to him about being a witness here.

Mr. BLACK.—That is all.

[Testimony of Arthur Simon, for the Defendants.]

ARTHUR SIMON, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. I will not ask you as to your politics, but get right down to the facts if possible. You reside in Siskiyou County?

A. Yes.

Q. How long have you lived there?

A. All of my life.

Q. What is your business, Mr. Simon?

A. At present I am cashier of the Bank at Montague.

Q. By the way Mr. Simon, how large a place is Montague, what is the population about?

A. About 500.

Q. Do you know Mr. Simon, the family known as the French family? A. Yes, sir.

(Testimony of Arthur Simon.)

Q. How long, please, have you known the male members of that family?

A. About three years.

Q. Do you know the general reputation of F. M. French, and his sons in that community for truth, honesty and integrity?

A. I think I do.

Q. Is that general reputation, Mr. Simon, good or is it bad? A. Well, it is bad.

Q. Have you any interest, Mr. Simon, of any kind or character in this controversy? A. No, sir.

Q. You have known Dr. Dwinnell a great many years, have you not? A. Yes, sir.

Q. How long have you known him, please?

A. Well, I could not say; 16 or 17 years, about that.

Q. During that time and up to the present time the Doctor has been a practicing physician in Northern California, has he not? A. Yes, sir.

Q. Mr. Simon, do you know the general reputation of Dr. Dwinnell, in that community where you have lived for a long while for the qualities of truth, of honesty and of integrity? A. I think I do.

Q. Is that general reputation good or bad?

A. Good.

Cross-examination.

Mr. BLACK.—Q. Have you ever heard any person say that Dr. Dwinnell was a timberman who was implicated in buying or hiring people to take up land in order to get them to relinquish to him?

A. I don't know that I ever heard of it.

(Testimony of Arthur Simon.)

Q. Did you ever hear of Dr. Dwinnell, being called before the United States Land Office in conjunction with E. A. Sullivan, who was the postmistress up there, Samuel Leavitt, John D. Gagnon, George Gagnon, G. W. Dwinnell and McCord, wherein it was charged that the applications of all those people were irregular and fraudulent?

A. I could not say that I have.

Q. Have you never heard of that?

Mr. SCHLESINGER.—One moment. We object to that, and we ask that the truth of that fact be shown.

The COURT.—No, let counsel proceed.

Mr. BLACK.—Have you ever heard of that?

A. I can't say that I have.

Q. Have you ever heard that there was an investigation in the Land Office in regard to what was known as the Soda Creek selections in which Dr. Dwinnell was implicated?

A. I think I have.

Q. Now, Dr. Dwinnell is a customer of your bank?

A. Yes.

Q. He does a large business with you?

A. Yes.

Q. Particularly friendly all the time?

A. No reason to be otherwise.

Q. Who told you to come down here as a witness?

A. Well, I presume the defendants sent for me.

Q. When did he tell you?

A. He didn't tell me. I was served with a subpoena.

(Testimony of Charles J. Lutrell.)

Q. Did you have any conversation with him as to coming down here? A. No, sir.

[Testimony of Charles J. Lutrell, for the Defendants.]

CHARLES J. *LUTTRELL,* called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. There has been some talk, Mr. Lutrell, about politics, here. You are a democrat, are you not?

A. That is my politics.

Q. Mr. Lutrell, what official position do you occupy in Siskiyou County?

A. I am District Attorney.

Q. You live at Yreka, do you not?

A. I do.

Q. How long, Mr. Lutrell, have you been a resident of Siskiyou county?

A. I have been a resident there all my life. I was away two years at school.

Q. How long have you been the prosecutor of men charged with crime?

A. I have been prosecutor up there since January 1903, it would be 7 years this coming January.

Q. Do you know Mr. Lutrell, a man named F. M. French? A. I do.

Q. Do you know his sons? A. I do.

Q. How long, please, have you known the male members of this French family?

A. Something like five or six years.

(Testimony of Charles J. Lutrell.)

Q. Mr. Lutrell, are you able to tell these twelve gentlemen, whether you know the general reputation of the male members of the French family for truth, honesty and integrity? A. I am.

Q. Are those general reputations good or are they bad? A. They are bad.

Q. Now, Mr. Lutrell, a final question, knowing that reputation as you do, would you believe them under oath?

A. I would not if they had any interest in the outcome of the case.

Q. You would not generally?

A. I would not generally.

Q. Do you know Dr. Dwinnell? A. I do.

Q. You are not his banker, are you?

A. I am not.

Q. You are not his attorney, are you?

A. I am not.

Q. How long have you known Dr. Dwinnell?

A. I have known Dr. Dwinnell, something like eight years, I think, possibly a little longer.

Q. Having known Dr. Dwinnell for more than 8 years, do you know what his general reputation in that community for truth, honesty and integrity is?

A. I do.

Q. Is that general reputation good or is it bad?

A. It is good.

Q. Have you any earthly interest in this controversy, Mr. Lutrell? A. Absolutely none.

(Testimony of Charles J. Lutrell.)

Cross-examination.

Mr. BLACK.—Q. Mr. Lutrell, Mr. French Senior electioneered against you, did he not, the last campaign? A. I don't know.

Q. Did you ever hear the name of Dr. Dwinnell connected with irregularities in obtaining land in the Soda Creek? A. In Soda Creek?

Q. Yes? A. I never did.

Q. Did you ever hear of his being connected with Elizabeth A. Sullivan, Maria S. Bossonnette, Samuel Leavitt, John D. Gagnon, George Gagnon, Mrs. Georgia Grimms, Jasper N. Terwilliger, and Jeanette A. Terwilliger, in irregularities in taking up timber land? A. I never did.

Q. You never heard it mentioned in that county?

A. I never have.

Q. Did you ever hear that there was an investigation in the Land Office over that matter?

A. I have heard of this case, of course, but I did not know what the particular names of the individuals were, who were connected with the case, whether it was those names you just read or not.

Q. Did you hear Dr. Dwinnell's name so connected with any transaction?

A. I have heard that Dr. Dwinnell was connected with this case that is on trial here.

Q. Have you ever heard that Dr. Dwinnell was a gambler?

Mr. SCHLESINGER.—One moment. What do you mean, playing whist?

(Testimony of Charles J. Lutrell.)

Mr. BLACK.—Gambling for money in John D. Gagnon's saloon?

A. I have heard that he played cards sometimes.

Q. Is it not known generally in the county that he is a regular gambler for money?

A. I think not.

Q. You have heard that he gambled for money?

A. I have heard he has played cards. I don't know just what interpretation you put on the word "gamble."

Q. Did you ever see him play cards in Gagnon's saloon for money? A. I never did.

[Testimony of John F. Fairchild, for the Defendants.]

JOHN F. FAIRCHILD, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Where do you live, Mr. Fairchild?

A. Yreka, Siskiyou County.

Q. You have lived in Siskiyou County how many years?

A. About all my life, about 38 years.

Q. You were born there? A. Yes, sir.

Q. You are not politically or otherwise connected with Dr. Dwinnell, or any of these defendants?

A. No, sir.

Q. I believe you, too, are a Democrat?

A. Yes, sir.

Q. Do you occupy any official position, Mr. Fairchild, in the county of Siskiyou?

A. Yes, I am the assessor of Siskiyou County.

(Testimony of John F. Fairchild.)

Q. How long have you been assessor of that county?

A. Well, for the last three years.

Q. Your position frequently takes you over all parts of the county? A. Yes, sir.

Q. Perhaps you meet nearly every ranch owner or property owner near there in the course of your official business? A. Yes, sir.

Q. Do you know Mr. Fairchild, a man named F. M. French and the male members of that family?

A. Yes, sir.

Q. Will you tell these twelve men, please, Mr. Fairchild, how long you have known them?

A. I have known them somewhere, I think, about three years.

Q. Do you know their general reputation, Mr. Fairchild, in that community for truth and integrity? A. Yes, sir.

Q. Is that general reputation good or is it bad?

A. Bad.

Q. Knowing it as you do would you believe them under their oaths? A. I don't think I would.

Q. Have you any interest in this controversy of any kind or character?

A. Nothing whatever.

Q. While you are here, Mr. Fairchild, I will ask you whether or not you know Dr. Dwinnell?

A. Yes, sir.

Q. Do you know any of the other defendants?

A. Yes, I know them all, I guess, Mr. Deter, and Mr. Gilpin.

(Testimony of John F. Fairchild.)

Q. The gentleman with the glasses here?

A. Yes.

Q. And Gilpin, you also know him?

A. Yes.

Q. Do you know their reputations in that small community for the qualities of truth, honesty and integrity?

A. I don't know as I have heard it discussed, but it is always considered good so far as I know.

Q. You have never heard a word in your life against Dr. Dwinnell, have you, or the other two defendants as to honesty and integrity?

A. I could not say that I ever did, no.

Q. You consider they have good reputations?

A. Yes, sir.

Cross-examination.

Mr. BLACK.—Q. Whom did you ever hear discuss the reputation of Samuel French?

A. That is the elder member of the family?

Q. No, one of the boys.

A. Why, I don't know as I have ever heard them discussed separately, but they are usually discussed or classed as the whole Frenches, or the French boys or gang, the Frenches are usually spoken of that way.

Mr. SCHLESINGER.—Q. As a gang of what?

A. The French gang or Frenches; they are usually termed that, usually as a whole, the Frenches or French gang or French boys.

Mr. BLACK.—Q. You have talked to some person about it, have you, about their reputation for truth, honesty and integrity?

(Testimony of John F. Fairchild.)

A. I have heard it spoken of.

Q. Whom have you heard talking about it?

A. Well, I have heard Charlie Lutrell.

Q. The last witness on the stand here?

A. He is a witness here.

Q. He is the District Attorney?

A. Yes. I have heard him speak of it.

Q. In the same courthouse with you all the time?

A. What?

Q. Occupying the same courthouse with you all the time? A. Yes.

Q. What did he say about them?

The COURT.—It is hardly necessary to go into that.

Mr. BLACK.—Q. Who else have you heard?

A. I have heard John Dowling and I have heard a man by the name of Williams—Solon Williams.

Q. He is a witness here too? A. Yes.

Q. What was the occasion of your talking with Williams?

A. I think it was pertaining to some trouble he had with them, my recollection is, I don't remember.

Q. Is it not a fact that the reputation you have testified to is that for quarrelsomeness?

A. For what?

Q. Quarrelsomeness?

A. Well, that feature is very prominent among them.

Q. Isn't that the characteristic that you generally heard discussed when you are talking about the Frenches, that they are willing to fight?

(Testimony of John F. Fairchild.)

A. It is generally all around about the men the way I have spoken of.

Q. In regard to fighting?

A. In every particular.

Q. Whom have you heard say that?

A. I have heard Williams say that, I have heard Dowling say that.

Q. You have already mentioned those. Who else? A. Stevens.

Q. Who is he?

A. He is a farmer out near Montague.

Q. Who else?

A. I don't know as I can recall the names of any other particular individuals right this moment.

Q. You base your opinions upon the statements of three or four people in the county?

A. No, I would think there would be more than that.

Q. Did you ever hear Dr. Dwinnell's reputation for truth, honesty and integrity questioned in regard to land matters?

Mr. SCHLESINGER.—One moment. I object to that as not being proper cross-examination. It is his general reputation for all matters and not for land matters.

The COURT.—He can ask him about that. He can ask that specific question.

Mr. SCHLESINGER.—Exception.

The COURT.—In other words, the witness may be asked whether he ever heard anything that reflects upon his character for integrity or honesty.

(Testimony of John F. Fairchild.)

He can ask that question, if he wishes. That is ultimately a question for the jury to determine whether—

A. You mean before this came up?

Mr. SCHLESINGER.—Just a moment. The Court is talking.

Mr. BLACK.—Q. At any time up to the present moment?

Mr. SCHLESINGER.—We take an exception.

A. His reputation has always been very good.

Mr. BLACK.—Q. I did not ask you that. I asked you if you ever heard it questioned in regard to land matters?

A. I have since this case came up, yes.

Q. Did you ever hear of his being implicated in what was called the Soda Creek land steal?

A. No, I never did.

Mr. SCHLESINGER.—We object to that as being insulting and not proper cross-examination.

The COURT.—The question is not insulting and it is proper cross-examination.

Mr. SCHLESINGER.—We take an exception.

The COURT.—The witness said he never heard about it.

Mr. BLACK.—Q. Did you hear that an examination was afoot for a number of years in regard to several applications that Dr. Dwinnell was connected with, as to the irregularity of the applications?

Mr. SCHLESINGER.—One moment. We object to that as not being proper cross-examination.

The COURT.—The objection will be overruled.

(Testimony of John F. Fairchild.)

Mr. SCHLESINGER.—Exception.

The COURT.—I have no control over an examination of this kind as long as it is kept within legitimate bounds.

Mr. SCHLESINGER.—Your Honor can see how unfair it is.

The COURT.—It is not unfair. Here is a witness; you place a witness upon the stand and he testifies as to the general reputation of a man in the community, that it is good for integrity or that is the general estimate in which he is held. Now, the District Attorney refers to specific instances and asks the witness whether he had ever heard of these specific instances.

Mr. SCHLESINGER.—That is just it.

The COURT.—That he has a right to do. If the witness says no that is the end of it. The mere fact that he asks the question is not proof that any such incident ever occurred. But I have to assume that the question is put in good faith.

Mr. SCHLESINGER.—That is the point. Have they any proof of a land steal?

The COURT.—The witness may have heard of such an incident as that and yet weighing it in connection with other matters he may reach the honest conclusion that his reputation is good.

Mr. SCHLESINGER.—Exception.

The COURT.—I presume there are very few men but what you can hear something about them or against them at some time.

Mr. BLACK.—Q. Will you answer the question?

(Testimony of John F. Fairchild.)

The Soda Creek Land Filing, did you ever hear of his being implicated in an examination in the Land Office? That is this particular case?

Q. No.

A. I don't believe I ever did; I don't remember it.

Q. How long have you lived in that country?

A. I was raised there.

Q. How long have you known the defendant Gilpin?

A. Why, I never did have much acquaintance with him, I think 3 or 4 years.

Q. What was his business when you met him?

A. Originally in the saloon business.

Q. Did you ever hear of his having drunken men in the saloon there and making them gamble?

A. No, sir; I never did.

Q. What do you know about Deter? Did you ever hear his reputation discussed at all?

A. Well, I have known Deter all my life, I was raised with him.

Q. A personal friend?

A. Well, not particularly, we have always been good friends.

Q. Did you ever hear of his helping Dr. Dwinnell out in taking up land filings?

Mr. SCHLESINGER.—We object to that.

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—Exception.

A. I heard that he was implicated with him, but I did not hear the details.

(Testimony of E. J. Loosely.)

Redirect Examination.

Mr. SCHLESINGER.—Q. Did you ever in your life hear of Dr. Dwinnell stealing a single acre of land from this Government? A. No, sir.

[Testimony of E. J. Loosely, for the Defendants.]

E. J. LOOSELY, called as a witness on behalf of the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Mr. Loosely, where do you live? A. Beswick.

Q. How long have you lived in Siskiyou County?

A. About 4 years.

Q. What is your occupation there?

A. I am a farmer.

Q. Have you any interest in this controversy at all? A. No, sir.

Q. Do you know a man named F. M. French?

A. Yes, sir.

Q. How long have you known him?

A. About three years.

Q. In February, 1908, in the county of Siskiyou, in the town of Montague, in that county, did you have any conversation with F. M. French, concerning Dr. Dwinnell? A. Yes, sir.

Q. In front of John Gagnon's saloon, in Montague, on the bench in front of John Gagnon's saloon in the month of February, 1908, did F. M. French say to you, as Dr. Dwinnell was passing by, "There goes the son-of-a-bitch. I will put him in the penitentiary even though I have to go there the balance of my life"? A. He did.

(Testimony of E. J. Loosely.)

Cross-examination.

Mr. BLACK.—Q. What is your business?

A. I am a farmer.

Q. You are particularly friendly with Dr. Dwinnell?

A. Yes, I am a friend of Dr. Dwinnell.

Q. Are you related to him? A. No, sir.

Q. Have you any animus against the Frenches?

A. No, sir.

Q. Ever had any trouble with them?

A. Never had one word with the Frenches.

[Testimony of H. H. Hudson, for the Defendants.]

H. H. HUDSON, called as a witness on behalf of the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Mr. Hudson, where do you live? A. Montague.

Q. How long have you lived in Siskiyou County?

A. About twenty years.

Q. What is your business? A. Merchant.

Q. A general merchandise dealer?

A. Yes, sir.

Q. Do you know a man named F. M. French?

A. I do.

Q. How long have you known him?

A. Probably twelve or fifteen years.

Q. In your store at Montague, Mr. Hudson, in 1907, did you have a conversation with F. M. French, in which he used this language, or the equivalent thereof: "I am going down to my house to get a gun to kill Dr. Dwinnell"?

(Testimony of H. H. Hudson.)

A. We had a conversation but the language is a little different from what is quoted there.

Q. Is that the substance of the language?

A. It is the substance of it.

Q. Will you repeat in your own way what he said to you at that time?

A. Well, he says, "I have a notion to go and get my gun and kill John Gagnon and Dr. Dwinnell." He says, "I will be damned if I don't believe I will go and do it." He always put the "believe" in, that he would do it.

Q. Did F. M. French ever try to borrow any money from you to prove up land?

Mr. BLACK.—I object to that as incompetent, irrelevant and immaterial.

Mr. SCHLESINGER.—I will bring it down. It was put to Mr. French, and he denied ever having tried to borrow money from anybody, including Mr. Hudson.

Mr. BLACK.—That is too general a question unless it is confined to the particular land here.

Mr. SCHLESINGER.—I said at any time.

The COURT.—You can take it at about the time these entries were made.

Mr. SCHLESINGER.—About, November, between October and November, 1906, the latter part of that year, the fall of that year, did F. M. French apply to you to borrow money for himself and his sons to prove up on public lands?

A. He did not ask me directly. I had a partner

(Testimony of H. H. Hudson.)

at that time in the mercantile business, and he came in and asked us jointly for it.

Q. He asked you both?

A. He asked us both for something like $700. He said he had some timber land that he wanted to prove up on.

Q. Did you give him the money?

A. No, sir.

Q. Now, I will ask you this question, and wait until counsel has a chance to object. About two years ago, in your store at Montague, Siskiyou County, California, did French say anything to you concerning Dr. Dwinnell and the penitentiary; if so, what did he say?

Mr. BLACK.—I object to that as incompetent, irrelevant and immaterial.

Mr. SCHLESINGER.—It is to show a threat, the animus of French.

The COURT.—Was the witness questioned about that?

Mr. SCHLESINGER.—He was not.

The COURT.—I will sustain the objection.

Mr. SCHLESINGER.—We will take an exception.

Cross-examination.

Mr. BLACK.—Q. You dealt with French for a number of years? A. Yes, sir.

Q. He paid his bills?

A. There is a balance now.

Q. There is a little dispute as to a few dollars he claims you owe him, and you claim he owes you?

(Testimony of H. H. Hudson.)

A. I owe him nothing.

Q. He says you do, doesn't he?

A. No, sir; I asked him for his bill a while back, and he never brought it in. If I owe him anything, I don't know anything about it.

Q. You are friendly with Dr. Dwinnell?

A. Yes, sir.

Q. How long have you known him?

A. I have known him probably about twelve or fifteen years, ever since he has been there. I don't recall the number of years.

Q. Has he done you any favors?

A. Dr. Dwinnell done me any favors?

Q. Yes.

A. He has been my family physician ever since.

Q. Who told you to come down here as a witness?

A. Why, the gentleman who served a subpoena on me. I don't know who he was.

Q. Do you know who gave him your name?

A. I do not.

Q. Were you paid for coming down here?

A. I expect to be paid for coming.

Q. Whom do you expect to pay you?

A. I expect the Government will pay me.

Q. What did you come down here for, do you know?

A. I came down here on that subpoena that I had.

Q. Is that to be a witness for Rex F. Deter?

A. Now, then I never read the subpoena over particularly who it was for.

Q. Have you got the subpoena copy?

(Testimony of H. H. Hudson.)

A. I think I have.

Mr. SCHLESINGER.—He is here.

Mr. BLACK.—There is this point about it. An affidavit is made on behalf of a certain defendant to bring witnesses on the ground that he cannot pay. If the witness comes here, and is not used by him, and is used for another person, the Government has been imposed on.

The WITNESS.—It says, "For the defendant George W. Dwinnell."

Mr. BLACK.—That is all.

Mr. SCHLESINGER.—So as to get the record straight, if your Honor please, I desire to have the record show that the questions put to the witness on the stand as to whether French had not threatened to send Dr. Dwinnell to the penitentiary and that in response to the examination that your Honor would not permit, appears on page 31 of the transcript.

Mr. BLACK.—I have no objection, if you want to ask him that direct question now, to do that.

Mr. SCHLESINGER.—If you have no objection, I will ask him.

Redirect Examination.

Mr. SCHLESINGER.—Q. Did you have any talk about two years ago with F. M. French, in which he said that he would send Dr. Dwinnell to the penitentiary, or equivalent words?

A. Yes, sir, he made that remark.

Q. In your store? A. Yes, sir.

(Testimony of H. H. Hudson.)

Recross-examination.

Mr. BLACK.—Q. In connection with that did he say that Dr. Dwinnell had deliberately cheated his boys out of their filing rights, and has lost to them about $7,500 by reason of that fact?

A. He said Dr. Dwinnell had cheated him out of some money. I don't know how much.

Q. Did he tell you in that same conversation that Dr. Dwinnell had deliberately deceived his boys into taking a filing that they were to surrender to Dr. Dwinnell for $200 apiece, and that if it had not been for that, each one of those boys could have made from $1,500 to $1,600 out of the land?

A. No, sir; he did not say that.

Mr. SCHLESINGER.—Q. Mr. French's wife worked for your wife, did she not?

A. Yes, sir.

[Testimony of John J. Perkins, for the Defendants.]

JOHN J. PERKINS, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Where do you live, Mr. Perkins?

A. About fifteen miles from Yreka.

Q. What is your business?

A. Mining and ranching.

Q. How long have you lived in Siskiyou County?

A. About 25 years.

Q. Do you know F. M. French?

A. Yes, sir.

Q. About a year and a half ago, in Montague, you and Mr. French alone being present, did you have

(Testimony of John J. Perkins.)

any talk with him concerning what he would do to Dr. Dwinnell? A. Yes, sir.

Q. What did French state in that conversation?

A. He said he would land the old son-of-a-bitch in the penitentiary if he had to go there himself.

Cross-examination.

Mr. BLACK.—Q. What else did he say in that same conversation?

A. He said that he caused him to lose about $10,000.

Q. In that way? A. I don't know.

Q. Did he say that it was because Dr. Dwinnell had deceived him and his boys in regard to taking up land, and thereby lost their rights to take up any further land?

A. He did not tell me.

Q. Did you have a personal encounter with Mr. French?

A. It was not personal. He just came in and made those remarks.

Q. Did you have a fight with him at any time?

A. Yes, sir.

Q. You have a personal animus against French?

A. I did not at that time; no.

Q. You struck him, and then he struck you?

A. No, sir.

The COURT.—Let us not go into that.

[Testimony of L. J. Rohrer, for the Defendants.]

L. J. ROHRER, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Where do you live?

A. Siskiyou County.

Q. How long have you lived there?

A. Close onto forty years.

Q. What is your business there, Mr. Rohrer?

A. Farmer and stock-raiser.

Q. Do you know a man by the name of F. M. French? A. I do.

Q. Did you last week, in front of the Federal Building, have any conversation with F. M. French, as to what he, not the Government, but he would do to Dr. Dwinnell? A. I did.

Q. What did he say in that conversation?

A. He said he would land Dr. Dwinnell behind the bars.

Q. How long have you known the various male members of the French family?

A. I have known some of them for about six years.

Q. Do you know their general reputation in that community for the qualities of truth and integrity?

A. I do.

Q. Is that general reputation good or is it bad?

A. Bad.

Q. Would you believe him under oath?

A. Not where any of them were concerned.

Q. Have you any earthly interest in this controversy? A. None whatever.

(Testimony of L. J. Rohrer.)

Cross-examination.

Mr. BLACK.—Q. Are you paid to come down here? A. I had a subpoena served on me.

Q. Are you paid to come down here?

A. No, sir.

Q. Do you expect to be paid?

A. I suppose so.

Q. By whom? A. By the Government.

Q. You are not here as a Government witness, are you? A. No, sir.

Q. You have not received any money so far, have you? A. No, sir.

Q. Whom have you heard talk about Sam French being untruthful?

A. A man by the name of Jonny Moore.

Q. When was that?

A. On general occasions in the last four or five years.

Q. Was he the only one?

A. No, sir; I have heard others.

Q. I said Sam French?

A. I understand you.

Q. Whom have you heard talk about Ben French? A. The same party and others.

Q. What was the occasion for it?

A. I don't remember what the occasion was.

Q. Where was it? A. At my place.

Q. What brought up the conversation?

A. I could not say what brought the conversation up.

(Testimony of L. J. Rohrer.)

Q. Did you ever have any trouble with the Frenches? A. No, sir.

Q. Whom did you tell that you would be a witness, and could come down here?

A. I did not tell anyone.

Q. Do you know how they got your name?

A. Yes, sir.

Q. Who gave the name?

A. Dr. Dwinnell, I suppose.

Q. Had you talked to Dr. Dwinnell about coming down here as a witness? A. No, sir.

Q. Do you owe Dr. Dwinnell any favors?

A. No, sir.

Q. Is he your family physician?

A. No, sir.

Q. Has he ever done you a favor at all?

A. No, sir.

Q. And do you know in what way he got your name?

A. He had me make an affidavit about a year ago, or such a matter.

Q. What for? A. About this case.

Mr. SCHLESINGER.—If you wish it, Mr. Black, here it is. They are all together.

Mr. BLACK.—Q. What was that about? I want to have that conversation.

A. What conversation?

The COURT.—It seems to me you are going a long way off.

Mr. BLACK.—That is all.

[Testimony of John S. Musgrave, for the Defendants.]

JOHN S. MUSGRAVE, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Mr. Musgrave, where do you live? A. Montague.

Q. Do you know F. M. French?

A. Yes, sir.

Q. How long have you known him?

A. About three years.

Q. Do you know his general reputation in that community for truth, honesty and integrity?

A. Yes, sir.

Q. Is that general reputation good or is it bad?

A. Bad.

Q. Have you any interest in this controversy?

A. No, sir.

Q. You will probably be asked this question, and I may as well ask it now. You occasionally put up the prescriptions for Dr. Dwinnell?

A. They are put up in the store.

Q. That would not affect your testimony?

A. No, sir.

Cross-examination.

Mr. BLACK.—Q. What is your business?

A. Clerk.

Q. Where? A. In a drug-store.

Q. Whose drug-store? A. Chamber's.

Q. He was the justice of the peace and notary public, and the editor that was on the stand?

A. Yes, sir.

(Testimony of J. B. Dowling.)

Q. Dr. Dwinnell sends prescriptions to your place to be filled? A. Yes, sir.

Mr. SCHLESINGER.—Q. And you fill them properly? A. Yes, sir.

[Testimony of J. B. Dowling, for the Defendants.]

J. B. DOWLING, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Where do you live, Mr. Dowling? A. I reside in Yreka.

Q. And how long have you lived in Siskiyou County? A. All my life.

Q. What official position do you hold there?

A. I am employed in a store.

Q. Are you a member of any board; are you not an official there too?

A. I am a member of the city council.

Q. Do you know F. M. French?

A. Yes, sir; I do.

Q. Do you know whether or not in the fall of 1906, he sought to borrow any money to prove up on timber lands? A. Yes, sir. I do.

Q. How much did he ask to borrow?

A. He came to the office and interviewed my brother. He asked who he could borrow the money from. He told him to see old man Eddy. He is the man who generally loans money on timber lands, and he said he thought he had the money.

Q. Have you any earthly interest in this controversy at all?

A. No, sir; not at all; no interest at all.

(Testimony of J. B. Dowling.)

Cross-examination.

Mr. BLACK.—Have you any animosity against the Frenches? A. No, sir.

Q. Did you ever have any trouble with them?

A. Not that I know of.

Q. Have you any interest in Dr. Dwinnell?

A. No, sir.

Q. You are friendly with him?

A. I am friendly with him.

Q. Is he your family physician?

A. Yes, sir.

Redirect Examination.

Mr. SCHLESINGER.—Q. Do you know the general reputation of F. M. French for truth, honesty and integrity? A. It is very bad.

Q. Would you believe him under oath?

A. No, sir.

[Testimony of R. F. Deter, for the Defendants.]

R. F. DETER, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Mr. Deter, in order to expedite matters, I will take you right down to the transactions involved in this indictment. You are the Rex F. Deter, one of the defendants here, are you not? A. Yes, sir.

Q. How long, Mr. Deter, have you lived in Siskiyou County? A. Thirty years.

Q. And what is your occupation?

A. I am a clerk by trade.

(Testimony of R. F. Deter.)

Q. Mr. Deter, did you in October or November, 1906, or at any other time make any agreement, contract or combination or confederation, with any member of the French family or anybody else whereby title to be secured by them from the Government should inure to your benefit?

A. I certainly did not.

Q. Where did you live when you filed your location? A. I lived in Portland, Oregon.

Q. Where are you living now?

A. In Portland, Oregon.

Q. Did you enter into any contract, any agreement, or have any understanding with Dr. Dwinnell, or Mr. Gilpin, your codefendants, that any land which you yourself would take up, would go to their benefit? A. I did not.

Q. You, Mr. Deter, appeared before the Land Office, and acquired public land from the Government. You made an affidavit, did you not at that time? A. Yes, sir.

Q. Did that affidavit contain a single word of untruth as you then understood it?

A. It did not.

Q. I will call your attention, Mr. Deter, to an application dated October 31st, 1906, and signed by you for certain land subject to sale, at Redding. Is there anything in that affidavit untrue?

A. No, sir; there is not.

Q. Did you ever have any talk or conversation with any members of the French family, or anybody else, that any land they should take up should go to

(Testimony of R. F. Deter.)

your benefit, or to the benefit of any of your codefendants? A. Decidedly not.

Q. In purchasing your own land, Mr. Deter, did you take it up in good faith, and for your own exclusive use and benefit? A. I certainly did.

Q. Have you any interest in any of the land involved in the indictment? A. No, sir.

Q. Did you ever have? A. I never had.

Q. Did you go to any member of the French family, and ask them to aid you in surveying land for Dr. Dwinnell? A. No, sir.

Q. Did anything of that kind occur?

A. No, sir.

Q. Just tell these twelve gentlemen who was it that located you upon Government land?

A. F. M. French.

Q. And how much money, if anything, did you pay this same F. M. French? A. $100.

Q. Did not Mr. French tell you that he had located any number of people on Government lands?

A. Yes, sir; he said he had been at it for twenty-five years.

Mr. BLACK.—I object to that as irrelevant, immaterial and incompetent, and move that the answer be stricken out.

The COURT.—It will be stricken out.

Mr. SCHLESINGER.—Q. And did he locate you on this particular piece of land?

A. Yes, sir.

The COURT.—The witness has testified that he did and that he paid him $100.

(Testimony of R. F. Deter.)

Mr. SCHLESINGER.—I thank your Honor for reminding me of the fact that he so testified.

Q. This is such an important matter, Mr. Deter, to the other defendants, as well as yourself, that I shall have to keep you on the stand for a moment. At Montague, on September 8th, 1907, in front of a saloon, in which an occasional game of cards, perhaps, has been played, a saloon called Gagnon's saloon, did you have any conversation with F. M. French, as to what he, F. M. French, would do when this case would come to trial in the United States District Court? A. Yes, sir; I did.

Q. And in that same conversation, did F. M. French say to you, "There goes the Doctor; the old son-of-a-bitch has done us up, and I will see him in the penitentiary if it costs me the rest of my life." Did he say that to you?

A. Well, not exactly that.

Q. What was it that he said?

A. He saw me over there, and immediately came over. He said, "Where are you living now"? I said, "I am living in Portland"; and he said, "What did you do with your timber claim." I said, "I have got it yet." He said, "You did not release it to old Doc." I said, "No, I certainly did not." "Well," he said, "you will have a chance to tell what you know when this case comes up before the United States District Court." I said, "What case"? "Well," he said, "you know old Doc did me and my boys up, and I am going to see the old son-of-a-bitch in the pen, if I have to go there for the rest of my

(Testimony of R. F. Deter.)

life." I left then because I did not care to talk about it.

Q. I will ask you a final question reading from this Indictment: Did you, with these codefendants, or you alone, request, subborn, instigate, or procure James Frederick French, Benjamin F. French, Frederick M. French, Samuel L. French, Clarence M. Prather, Arthur W. Jacquette, or any one of them, to make any false statement in the Land Office?

A. Most decidedly I did not.

Q. Did you tell them or request them to make any statement of any kind? A. No, sir.

Q. Did you have any interest in any statement that they might make? A. None whatever.

Q. Or did you agree with anyone beforehand that the land that each of those men should apply for would be for your benefit, or for the benefit of your codefendants, or any of them? A. No, sir.

Q. And have you ever got a single inch of that land? A. No, sir. I have not.

Q. There has been something said in evidence about a most gigantic transaction involving five dollars. I have not asked you about that. Did any such transaction, while you were in that great line there of 150 or 175 people, take place between you and F. M. French; if so, what was it?

A. I don't know whether it did or not. It might possibly have been a collection that was taken up to pay people to relieve us. We threw in a pool to hire a man to relieve us. We had to go away to our

(Testimony of R. F. Deter.)
meals and other things and this man came there to relieve us alternately so that we could get away.

Q. Then, I understand you to say—we, want this thing cleared up—that during those two days that you were in line, you were relieved by a substitute?

A. We certainly were.

Q. Did that substitute act through charity, or was he paid? A. He was paid, and well paid.

Q. That happened in the case of probably 75 or 100 people? A. Yes, sir.

Q. You did not remain on your feet two entire days? A. I did not.

Q. You ate in the interim and slept?

A. Certainly I did.

Cross-examination.

Mr. BLACK.—Q. Did you pay all your expenses down to Redding? A. I did.

Q. Did you get any money from anybody to pay your expenses with?

A. No, sir; I had my own money.

Q. Did you make out any applications for Jacquette? A. I think I did, yes, sir.

Q. What did you do that for?

A. For the simple reason that he asked me to do it.

Q. Were you acting in conjunction with anybody when you did that?

A. No, sir; merely through friendship for him.

Q. When you went to the Land Office, you took the oath there? A. Yes, sir.

Q. Did you relinquish your claim to anybody?

(Testimony of R. F. Deter.)

A. Did I relinquish to anybody?

Q. Yes. A. Yes, sir.

Q. To whom?

A. I did not relinquish to anybody. I scripped the land and sold the scrip.

Q. Who got your land?

A. A man by the name of Bissell.

Q. And did Dr. Dwinnell have anything to do with it? A. Indirectly.

Q. In what way? A. As an adviser.

Q. Did he get the relinquishment for you?

A. Did he get the relinquishment?

Q. Yes, that is, did he attend to it?

A. He attended to part of it for me, yes.

Q. Is that relinquishment made out in the handwriting of Dr. Dwinnell or in your handwriting (handing)?

A. I think that is made out by the Doctor.

Q. Witnessed by the Doctor? A. Yes, sir.

Q. Signed by you? A. Signed by me.

Q. Can you account for the other relinquishment that is attached there, signed by two other people?

A. That relinquishment was signed by me.

Q. Do you know under what circumstances?

Mr. SCHLESINGER.—Is that the paper that I asked you to produce, Mr. Black?

Mr. BLACK.—Yes.

A. Under what circumstances. What do you mean by "what circumstances"?

(Testimony of R. F. Deter.)

Q. Do you remember where you were when you signed it?

A. I think I was in Montague, when I signed this.

Q. Who made that out? A. I don't know.

Q. Do you remember who got you to sign that one?

A. I don't think anybody got me to sign it. I signed it of my own free will.

Q. You had already made one relinquishment. Who told you you would have to make another one?

A. There was not anyone told me that I know of.

Q. You made two in order to relinquish the one piece of land, did you?

A. I think the land was relinquished first to Mr. Bissell, and then later was made over to his wife. I think that is the reason.

Mr. SCHLESINGER.—Q. You mean by that, relinquished to the Government?

A. They wanted it in her name instead of his.

Mr. BLACK.—Q. To whom did you give the first relinquishment, that is, this first paper here, that is signed by you, and signed by you and witnessed by G. W. Dwinnell, dated the 21st day of November, 1906? A. Whom did I give it to?

Q. Yes. To whom did you give it?

A. I sent the papers by mail to the Doctor.

Q. To Dr. Dwinnell? A. Yes, sir.

Q. Where were you when you signed that paper?

A. I don't know. I think I was in Portland when I signed that. I am not sure.

Q. You are not sure?

(Testimony of R. F. Deter.)

A. I am not sure about that.

Q. Having sent one relinquishment, how did you get the information that you would have to make another one, if you were in Portland?

A. I got the information by mail, I suppose.

Q. From whom?

A. I don't know. I don't remember the transaction at all.

Q. It has utterly gone from your mind?

A. Yes, sir.

Q. Did you get any money for relinquishing it?

A. Yes, sir.

Q. How much?

A. I don't remember what I did get now; something like $300.

Q. Who paid it to you?

A. It was paid to me by *Mr.*

Mr. BLACK.—I ask that this be marked Government's Exhibit—

Mr. SCHLESINGER.—We introduced it and want it marked as our exhibit.

Mr. BLACK.—You did not ask to have it marked.

Mr. SCHLESINGER.—So long as it is in, very well.

The COURT.—It does not make any difference.

* * * * * * * * *

Mr. BLACK.—Q. I show you a paper marked Government's Exhibit No. 2, and ask you to look at the name R. F. Deter, and state whether or not that is your signature (handing)?

(Testimony of John Gilpin.)

A. It looks very much like my signature.

Q. You will not deny that you got $5?

A. I don't deny the signature.

Q. Were you in the habit of writing your name around in people's memorandum books for the fun of the thing? A. No, sir.

Q. What did you do that for?

A. I don't know that I did. I will not deny the signature. It looks very much like mine.

[Testimony of John Gilpin, for the Defendants.]

JOHN GILPIN, called as a witness for the defendants, being duly sworn, testified:

Mr. TAYLOR.—Q. Where do you reside, Mr. Gilpin? A. Montague.

Q. How long have you lived there?

A. About five years, between four and five years, somewhere along there.

Q. What is your business now?

A. Common laborer.

Q. Were you ever a timber cruiser?

A. A timber cruiser?

Q. For locating people on public lands?

A. I have located some, yes, sir.

Q. How many years back?

A. I helped locate some up in Oregon, too; Mr. J. C. Eastlend.

Q. You have located some in Siskiyou County?

A. Yes, sir.

Q. Did you locate Mr. Jacquette?

(Testimony of John Gilpin.)

A. Yes, sir.

Q. You know him? A. Yes, sir.

Q. And his brother in law—what is his name?

A. Frank Ritchie.

Q. Did you locate him? A. Yes, sir.

Q. Any other that you located at that time?

A. Yes, sir.

Q. How did you happen to locate them on timber land, tell us?

A. Charles Freer and Frank Ritchie were standing somewhere about the postoffice in Montague, and they said to me as I started into the office, "I hear you have been out in the timber." I said, "Yes." They said, "Have you got any good claims that you can locate us on"? That was the morning after I had been out. The next morning as near as I can recollect. I told them yes, if they had the price. They laughed.

Q. What did you charge them? A. $150.

Q. Each? A. Each.

Q. Did you go afterwards to the Land Office at Redding at the opening of the land with those three parties? A. I did.

Q. What was the purpose in going there?

A. I knew there was going to be a line-up. I did not suppose they could stay there, I did not know how long for some term of time, maybe two or three days or a week. I did not know how long, exactly, it would be.

Q. What did you go for?

(Testimony of John Gilpin.)

A. I went there to help them three men that I located.

Q. What do you mean by "helping them"?

A. Sit in their place while they went to their meals, or any other place they had to go.

Q. Did the Frenches go down at the same time that you did?

A. I think there were some of them.

Q. Some of them bought their tickets to Dunsmuir, and not clear through to Redding?

A. Yes, sir; I believe they did.

Q. What was the purpose of it?

A. We expected to line up there. I did not want any more rush. I did not want to stand in line any longer than I had to. That was our object.

Q. Was your object so that other people would not know you were starting to the Land Office?

A. So that they would not know that we went there.

Q. How long was that before it opened?

A. I think we went down several days.

Q. When did you commence to stand in line at the Land Office, how long before it opened?

A. As near as I recollect about two days.

Q. By the time the thing got opened, how many people were in line? Give us a guess at it.

A. A big number, I don't know how many.

Q. A couple of hundred or so?

A. I should judge so.

Q. All having to be relieved at intervals to go to their meals?

(Testimony of John Gilpin.)

A. I suppose so. As far down the line as I could see they were relieved at times.

Q. You located for Jacquette? A. I did.

Q. And for $150. A. $150.

Q. Was there any arrangement or agreement between yourself and Jacquette, or Ritchie or the other man that you located, that you or any of your codefendants should have any of the lands that they were to file on? A. No, sir.

Q. Tell the jury your particular agreement with Mr. Jacquette?

A. I was talking with him about taking a claim.

Q. Go right at the arrangement.

A. And he hesitated whether it would be worth while to take it or not. He said, "What would it be worth?" I asked him what he meant by "worth." Before he proved up or after, and he said in case he did not get the money to prove up, what would it be worth for relinquishment? I told him it would be worth $200 anyway.

Q. How were you to get your pay?

A. He was to give me $150 if he got the claim.

Q. If he made final proof?

A. If he made the final proof.

Q. Was that the arrangement with all the rest?

A. No, sir. There was no other arrangement in regard to guaranteeing anything, only for Jacquette.

Q. Did you ever have any arrangement or agreement or understanding with old man French, or either one of his boys, or Clarence Prather, or Jacquette, that the land that either of them should file

upon should go to the benefit of yourself or Dr. Dwinnell, or John Gagnon, or Rex Deter, or anyone else?

A. No, sir.

Q. Did any of it go that way?

A. The one-quarter that Jacquette filed on, I took.

Q. You took?

A. I took. I put scrip on.

Q. That is 160 acres? A. 160 acres.

Q. That you scripped? A. Yes, sir.

Q. Who has that now?

A. I have. This is the paper right here, if you wish to see it.

Q. Did you ever ask any man at that time, or anyone that I have mentioned, to go to the Land Office and make a false affidavit, or any affidavit?

A. No, sir, I did not.

Cross-examination.

Mr. BLACK.—Q. How did you come to get the quarter that Jacquette filed on?

A. How did I come to get it?

Q. Yes.

A. Jacquette relinquished it.

Q. Who brought you the relinquishment?

A. Who brought it to me?

Q. Yes.

A. I don't know as it was ever brought to me.

Q. Where did you get it?

A. When did I get it?

Q. Where?

A. I said I do not know that I ever got it.

(Testimony of John Gilpin.)

Q. You got the land, did you? A. I did.

Q. Who made out the relinquishment, do you know?

A. I could not say. I suppose the Doctor made it out. I asked him to.

Q. Oh, you did?

A. I did, that is, I asked him to get the relinquishment from Jacquette if he would sell it reasonably.

Q. Did you get the relinquishment from Dr. Dwinnell, after he got it from Jacquette?

A. I did not, as I recollect.

Q. What was done with it, if you know?

A. I asked him to place scrip on that if he knowed where to get it for me.

Q. You have that land to-day? A. I have.

Q. Did you pay Jacquette anything?

A. Did I?

Q. Yes?

A. I asked Dr. Dwinnell to pay him.

Q. How much?

A. I could not state any certain price, if he could get it at any reasonable price.

Mr. TAYLOR.—Q. You paid for the arrangement? A. My money paid for it.

[Testimony of G. W. Dwinnell, for the Defendants.]

G. W. DWINNELL, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Doctor, what is your profession, please? A. Physician.

Q. Are you a graduate of any Medical college?

(Testimony of G. W. Dwinnell.)

A. I am a graduate of Rush Medical College.

Q. Where have you been practicing your profession within the last twenty years?

A. I have been in Montague for about 18 years.

Q. You practice in the Northern Counties, do you, of this State? A. Yes, sir.

Q. You have a partner in connection with your profession?

A. No, sir. I am alone at Montague.

Q. But you have been and are now in active practice as a physician in those counties?

A. Yes, sir.

Q. You will have to wait until the prosecuting officer has a chance to object to the questions, if he sees fit to do so. Do you know a man named F. M. French? A. Yes, sir.

Q. How long have you known him, please?

A. I have known him some six or seven years.

Q. In November, or the fall of 1906, did you have any talk or conversation with F. M. French at Montague, in which you stated to him that there was a lot of land there that was in a temporary reservation, and that it was going to be opened up, and that you had a lot of timber up there, and wanted to get it all in together, so that you could make a sale of it?

A. No, sir.

Q. Did any such talk as that occur between you and F. M. French? A. No, sir.

Q. At any time, Doctor, did you write to the French boys, or to F. M. French, or to any member of that family, to the effect that you wanted them to

(Testimony of G. W. Dwinnell.)

take up land for your benefit, and that you would give them $200 each if they would relinquish the land to you? A. No, sir.

Q. Did you ever authorize any such letter to be written?

A. You are talking now prior to—

Q. I am talking of this letter of $200.

The COURT.—Q. Prior to October 31st?

A. No, sir, I never wrote any such letter.

Mr. SCHLESINGER.—Q. Did you ever write any letter to them in which $200 was in anywise mentioned?

A. No, sir. I never wrote a letter to the boys before October 31st, in the world of any kind.

Q. Did you ever send them a letter with the words or figures $200, written therein?

A. Prior to October 31st?

Q. Yes. A. No, sir, I never sent it.

Q. Or any other time?

A. Yes, sir. I sent one of them—

Q. I do not think you quite understand my question. Pay attention now. Did you ever send them a letter prior to the time of location in which you promised to pay them $200? A. No, sir.

Q. For relinquishing their title to you?

A. No, sir.

Q. Did you ever address a letter to the French boys? A. No, sir.

Q. Did you, as a matter of fact, at any time, have any understanding or agreement with any member

of the French family, or any other person, that they were to take up land and relinquish the same to you?

A. I did not.

Q. Did you ever suggest or request or indicate to any one of the entrymen, whose names appear in these documents, that they should appear before the Land Office at Redding and there make any false statement? A. No, sir, I did not.

Q. Did you ever in your life give any money to the French people at Redding?

A. No, sir, I never did.

Q. Now, Doctor, did Mr. F. M. French call on you at Montague with reference to locating Government land? A. Yes, sir.

Q. Will you kindly state to the jury in your own way, and without any further interrogating you on that subject, just what occurred in that conversation? A. About my employing him?

Q. Yes. State the entire thing just as it happened.

A. Mr. French was in the office, and I asked him, speaking about land, I asked him if he knew anything about timber lands, and about running lines, and he said he did. I told him that there was to be some land thrown open that I wanted to have looked up, and see whether the timber was worth locating. My sister and her husband in Chicago, Mr. and Mrs. J. E. Slater, and my brother, J. L. Dwinnell, and his wife, of Lodi, Wisconsin, had asked me to see if I could get them some timber claims. I engaged Mr. French to look up this land that was to be thrown

(Testimony of G. W. Dwinnell.)

open. I was familiar with the country, but not with the different quarter sections, and he went and spent some days—probably two or three weeks—two weeks anyway,—looking up the land. He came back, and the report that he made to me was that there was not as much as one million feet on any one claim, and I told him that the claims would be valueless for what I wanted them.

Q. What did he then say to you in that same connection, Doctor?

A. He said that he and his boys would like to take the claims. I told him that they were valueless to me.

Q. Did he say in that conversation, or prior to that time that he was broke, that he had quit drinking, and that he wanted to be a good citizen, and asked you to help him, or what did he say in that connection?

Mr. BLACK.—I object to the question as leading and suggestive.

Mr. SCHLESINGER.—It is.

Q. What did he say in that connection?

A. He told me that he had stopped drinking, and was going to do better, and wanted me to help him.

Q. Did he say anything about taking up those lands for his own use and benefit; if so, what did he say?

A. He said— Just at that conversation, at that time?

Q. At that conversation or following that conversation.

(Testimony of G. W. Dwinnell.)

A. Following that, he told me that he wanted to borrow money to pay his expenses. He did not have money to pay his expenses down to Redding to take up the lands.

Q. That is, after he had made his report to you?

A. Yes, sir.

Q. And you had said to him that it was valueless for your purpose? A. Yes, sir.

Q. What did he say to you in connection with that, about borrowing money from you?

A. I told him that I had no money to loan. He said that if I would let him have the money, when he borrowed the money to prove up on his claims, he would borrow enough to pay me back. That would be only a short time. I never had any full statement for the cruising and I let him have $50.

Q. Did you give him that money at Redding, or where did you give it to him?

A. I never gave him any money at Redding.

Q. Where did you give it to him?

A. I gave it to him at Montague.

Q. Was that before the lands were thrown open for location? A. Yes, sir.

Q. How much did you give him?

A. I gave him $50.00.

Q. Did he promise to return it?

A. Yes, sir.

Q. Now, Doctor, directing your attention to a time after these lands had been located, did you again see F. M. French? A. Yes, sir.

(Testimony of G. W. Dwinnell.)

Q. Did you see F. M. French, in your office in Montague, between the 31st of October, and we will say, the 1st day of December? A. Yes, sir.

Q. Did he at any time ask you for any money?

A. Yes, sir, he asked me to loan him money to prove up on his claims.

Q. What did he say in that connection?

A. He said he had not been able to borrow the money and wanted me to loan it to him.

Q. He had not been able to borrow the money for what purpose?

A. To prove up on their claims.

Q. That is, you mean, to pay the Government price? A. Yes, sir.

Q. Did he say he had made any effort to obtain the money from other sources?

A. Yes, sir, he said he had been unable to borrow it.

Q. Did he ask you then to lend him the purchase price to be paid the Government? A. Yes, sir.

Q. And what did you say to him?

A. I told him I had not any money to loan.

Q. How long was it that he applied to you for these moneys? How long after he had located the lands?

A. I could not say. It was after the filing on the 31st of October and before the 1st of December.

Q. How many days after the 31st of October, or after the date of the filing was it that he called on you and said he could not borrow the money, that he had

(Testimony of G. W. Dwinnell.)

tried to, and failed, and wanted to borrow it from you? A. I could not tell you.

Q. Would you say two, or three or four weeks?

A. I should say about two weeks. It is three years ago now.

Q. How much time did he have in which to pay the Government's purchase price?

A. I think from 60 to 90 days.

Q. In other words, if he was not to pay the Government's purchase price within 60 or 90 days, he would forfeit his rights to the land?

A. Yes, sir.

Q. You told him at that time that you could not let him have the money? A. Yes, sir.

Q. Did he or not say, that he had completely given up the idea of being able to get it?

A. Yes, sir, he said he was afraid he would lose his claims.

Q. Did he at that time, or at any subsequent time, talk to you about relinquishing his claims back to the Government? A. Yes, sir, he did.

Q. What did he say in that connection?

A. He said if he could get someone to take them up, and get something for them, he would relinquish them.

Q. Did he or not, in that same conversation, beseech you to get a person to buy his relinquishment?

A. Yes, sir.

Q. Tell these gentlemen what he said to you in that connection.

(Testimony of G. W. Dwinnell.)

A. He said he was afraid he would lose them, and wanted me to get some one to buy his relinquishments so that they could take up the land. I told him that I thought there would be no difficulty in doing it. I talked around there about it, and Mr. Gagnon—

Q. Who was Mr. Gagnon, who has been termed here a saloon-keeper in Montague, by the way?

A. Mr. Gagnon was a very dear friend of mine. We had lived together for seventeen years.

Q. A graduate of Santa Clara College, was he not? A. Yes, sir.

Q. And a lawyer by profession?

A. Yes, sir.

Q. But had not practiced?

A. But had not practiced.

Q. He was there for his health?

A. Yes, sir.

Q. Was Mr. Gagnon a man of any means?

A. Yes, sir.

Q. What did you do in connection with that matter between Mr. Gagnon and Mr. French? I know this is rather a distressing subject, Doctor, but if you will compose yourself, as well as you can, and take your time, I shall be obliged.

A. Mr. Gagnon and I, prior to this, had made some investments in timber lands, and I told him—

The COURT.—You had better take up some other branch of this Mr. Schlesinger.

Mr. SCHLESINGER.—I will pass to another subject.

(Testimony of G. W. Dwinnell.)

Q. Did you ever pay, of your own money, a single five cent piece to Mr. French, for these relinquishments? A. No, sir.

Q. Did you then, or have you since, ever acquired a single acre of that land? A. No, sir.

Q. Doctor, did you finally make any arrangement satisfactory to Mr. French, whereby Gagnon would purchase the relinquishments? A. Yes, sir.

Q. What was the price agreed upon?

A. Two hundred dollars.

Q. Was that paid to Mr. French?

A. Yes, sir.

Q. In what form was it paid? Whose check was it, if it was a check?

A. I could not tell you about that.

Q. Was it your money? A. No, sir.

Q. Was any portion of it your money?

A. No, sir.

Q. Whose money was it?

A. It was Mr. Gagnon's money. Mr. Gagnon got three of these claims.

Q. Who got the other?

A. Mrs. Darling got one.

Q. Who is Mrs. Darling?

A. A lady living in Yreka.

Q. Did you obtain one five cents' worth of profit in these transactions? A. No, sir.

Q. Either in the way of land or in the way of money? A. No, sir; I did not.

Q. Did you charge any of these people, either the French crowd, or the purchasers, any commission?

(Testimony of G. W. Dwinnell.)

A. No, sir.

Q. And did you do those things solely and entirely at the instigation of F. M. French?

A. Yes, sir.

Q. I will ask you this final question so as to conclude the examination. Doctor, you have owned a great deal of land, have you not, in that northern country? A. Yes, sir; considerable.

Q. You purchased from private owners?

Mr. BLACK.—I submit, if your Honor please, that counsel should not testify. If he has any questions to ask I have no objections.

Mr. SCHLESINGER.—I wanted to conclude.

Q. How much land have you purchased from private owners? Just roughly estimate it?

A. All I have ever purchased and sold.

Q. Yes.

A. I have probably purchased 12,000 acres.

Q. That is, during your 18 years' residence in that county? A. Yes, sir.

Q. That is during the dull times and during the rise in timber lands there? A. Yes, sir.

Q. I will ask you this final question: Did you at any time instigate or request any of the entrymen to make any false statements before the Land Office?

A. I did not.

Q. Or did you have any agreement, express or implied, prior to the dates of their location, or even subsequent thereto, that any of the land received by them from the Government should inure to your benefit, or to the benefit of your codefendants?

(Testimony of G. W. Dwinnell.)

A. I did not.

Q. Without descending to specifics, in how many cases during your eighteen years of residence in that county, have you filled up blank papers for entrymen?

A. I have filled them up dozens of times.

Q. Dozens and dozens of times?

A. Yes, sir.

Q. Without charging them anything for it?

A. Yes, sir; I never charged a cent for anything of that kind that I ever did.

Q. And how many persons of that county, roughly estimating, have you aided financially and clerically, in obtaining for them title to Government land without charge? Just roughly estimate it.

A. I should say at least thirty.

Q. In which you did not receive a single cent of compensation? A. Yes, sir.

Q. Have you ever in your life charged anybody any money for aiding them in securing the titles to Government land? A. I never have.

Q. Are there any lawyers in Montague?

A. No, sir.

Q. You have frequently helped your patients and friends in matters of this character, have you not?

A. Yes, sir.

Q. Upon your oath, you tell these gentlemen you did not profit a single dime by any of these transactions? A. Yes, sir.

Mr. SCHLESINGER.—That is all.

(Testimony of G. W. Dwinnell.)

Cross-examination.

Mr. BLACK.—Q. How many acres do you own now of timber land?

A. About 3,000 acres; between 3,000 and 4,000 acres.

Q. How many acres did you own in October, 1906?

A. I think I owned about 4,000; 4,000 or 5,000; 4,000.

Q. Where were those lands situated?

A. Situated—In what Township?

Q. In what Township? A. 47.3.

Q. 3 West?

A. 3 West 46.2 West. 46.3 West. 45.2 West, and 45.3 West.

Q. How many of these six applications to purchase did you personally make out?

A. I made them all out, if they asked me to.

Q. I hand you Government's Exhibits 1, 6, 7, 8, 9 and 12, and ask you to look at them and state how many of the applications you made out personally?

Mr. SCHLESINGER.—Do you mean by that filled up?

Mr. BLACK.—Yes.

A. I made out four of them.

Q. What numbers or names. That answers my purpose. I hand you Government's Exhibits 3, 4 and 5, applications to purchase, and ask you did you personally attend to putting the applications through?

(Testimony of G. W. Dwinnell.)

Mr. SCHLESINGER.—Do you mean by that he filled them up and sent them on?

Mr. BLACK.—If he had anything to do with it.

Mr. SCHLESINGER.—Q. Just tell him what you had to do with it, in answer to that question, if you will?

Mr. BLACK.—Q. Which one is that you are now looking at? A. Mr. Gagnon's.

Q. Did you have anything to do with that?

A. Yes, sir.

Q. What did you do?

A. I got the application from Mr. McKay and filled out the application for Mr. Gagnon and took such other steps as the State required in getting State scrip.

Q. And when you got the scrip what was done with that?

A. Well, you do not get any scrip. You just simply file these at Sacramento in the State Surveyor General's Office.

Q. That is where you make application to get the State to make the exchange of land?

A. Yes, sir.

Q. When you get certificate what do you do with the relinquishment?

A. You do not do anything. That relinquishment has nothing to do with the certificate.

Q. I know that, but you held the certificate until you were ready to make application for taking the land by State indemnity? A. Yes, sir.

(Testimony of G. W. Dwinnell.)

Q. And in no instance did you send to Mr. Leininger the relinquishment until the scrip, as it is called, that is the right to take the land was perfected? A. No, sir; it would be foolish.

Q. Now, take the next one?

A. The next one is John Doty.

Q. What did you have to do with that?

A. I simply helped him to make out his application and sent it to Mr. Reilly, N. F. Reilly at San Francisco, I think, to get the scrip.

Q. What is the next one you had anything to do with? A. C. W. Dowling.

Q. What land was embraced in the Dowling application?

A. The west half of the west half of section 12, 45.3.

Q. That is the land that F. M. French had taken up? A. Yes, sir.

Q. What did you do with that application?

A. I never saw that application.

Q. You did not have anything to do with that?

A. Yes, sir, I think I may have had something to do with it and I may not. I don't know. I helped so many different people get these pieces that I don't know whether I did or not.

Q. You were at Redding the day of the opening of this reservation land?

A. Yes, sir, I arrived there about an hour before the lands were thrown open.

Q. What did you go down there for?

(Testimony of G. W. Dwinnell.)

A. I did not go down there. I stopped on my way north.

Q. You just happened to be there at that time?

A. No, sir, I stopped to see Judge Bickford.

Q. Did you help him make out any applications while you were there?

A. I did not help Judge Bickford. I made out applications while I was there, I was a couple of hours at it. The attorneys were all so busy that they had more than they could do in that line.

Mr. SCHLESINGER.—Q. That is, you mean you made them out for your neighbors?

A. Yes, sir.

Mr. BLACK.—Q. Did you receive a receipt from French for the money that you paid him?

A. I don't remember whether I did or not.

Q. Have you not a receipt now in your possession?

A. Not for the $200 that I paid him for scrip, I have not any receipt.

Q. Did you have a receipt for relinquishing to you?

A. Not for the $200, that I paid him, that he was paid for relinquishing, no.

Mr. SCHLESINGER.—Q. Mr. Black, asked "for relinquishing to you." Did he ever relinquish to you?

A. No, sir, he did not relinquish to me; he relinquished to the Government.

(Testimony of G. W. Dwinnell.)

Mr. BLACK.—Q. How many letters did you write to Mr. French, in regard to this cruising business? A. I don't think I wrote him but one.

Q. In your life? A. Yes, sir.

Q. What was that about?

A. I could not tell you.

Q. When was it?

Mr. SCHLESINGER.—We have the letter here in evidence.

Mr. BLACK.—Q. I show you an old ragged letter dated November 15th, 1906, signed G. W. Dwinnell, is that the letter you refer to (handing)?

A. I never wrote that letter.

Q. Whose handwriting is that?

A. It is not mine. No, sir, I never wrote that. No one who ever saw my handwriting would ever say that was my handwriting.

Q. Did you authorize that to be written by anyone? A. Not that I know of.

Q. Did you have any dealing with French in regard to looking up the south half of the south half of Section 10? It does not say what township?

A. No, sir, I don't think I ever did.

Q. Did you have any talk with anyone that you told to write to French and sign your name to it in regard to that piece of land?

A. I cannot recall any section 10.

Q. How long did French remain in your employment for looking up land?

A. About three weeks.

Q. During what time?

(Testimony of G. W. Dwinnell.)

A. It was in either the latter part of September or the first of October, along that time.

Q. How many pieces or rather regions of country did French go into for the purpose of investigating timber for you? A. One.

Q. Just one? A. Yes.

Q. What township were they located in?

A. They were in 44.2. I think they were all in 44-2.

Q. 2 West, you refer to? A. 2 West.

Q. Now, Mr. Gagnon, kept a saloon, did he not?

A. Yes.

Q. How many years did he keep a saloon?

A. Why, I don't know.

Q. How many do you think?

A. I think—15 years.

Q. Just a plain, ordinary day saloon?

A. Yes. It was not like most saloons.

Q. Now did you say anything to Gagnon as to buying the Frenches' relinquishments?

A. Yes.

Q. How much did Gagnon give for those relinquishments finally?

A. He gave me $200 apiecee for them.

Q. Did you sell to Gagnon those relinquishments for $1600? A. No, sir.

Q. You were a witness before the Grand Jury, were you not, Mr. Dwinnell? A. Yes.

Q. Before the Grand Jury, a few days prior to the filing of the Indictment in this case, do you remember making this statement: "I told Mr. French

(Testimony of G. W. Dwinnell.)

I would give him $200 each and the money I loaned them for their relinquishments. I sold to Gagnon for about $1600''? A. No, sir.

Q. In the presence of 21 Jurymen did you not make that statement?

A. No, sir; if you would include in that the scrip, the relinquishment and everything that would be—

Mr. SCHLESINGER.—Q. I do not catch your answer. You dropped your voice, Doctor?

A. I say if you include in that the scrip and everything that would be the amount.

Q. That would have been the amount you had paid to these people? A. Yes.

Mr. BLACK.—Q. Then you did get money for these lands from Gagnon?

A. Yes—not for the lands; I got money for the scrip.

Q. That money came to you personally?

A. Came to me, yes.

Q. Did you not testify awhile ago that you never were paid any money and that you never had anything to do with this in any shape, manner or form?

A. You understand—

Q. Will you explain that?

A. Yes. I sold that. Mr. Gagnon, bought these relinquishments and I did not make a penny out of the relinquishments at all, and I had this scrip, you see, and I sold that scrip to Gagnon.

Q. That is, you sold the scrip so that Gagnon could take this land that was relinquished with that scrip? A. Yes.

(Testimony of G. W. Dwinnell.)

Q. How much profit did you make on your scrip?

A. Well, I could not tell you—not very much. I did not make as much profit as though I had sold it to a stranger.

Q. I did not ask you that. I asked you how much did you make? A. I could not tell you.

Q. Could you approximate it?

A. No, sir, I don't think I could now.

Mr. SCHLESINGER.—Q. Just your best idea, Doctor, he means. That was open market scrip, was it? A. Yes, I would have sold that to anyone.

Mr. BLACK.—Q. I have not heard your answer. Are you thinking?

A. No, sir. I said I could not remember.

Q. You have no idea what your profit was in that $1600 deal with Gagnon?

A. Why it was very small.

Q. You have no idea of the amount, have you?

A. I could not tell you the amount; it was a small amount.

Mr. SCHLESINGER.—Q. That don't mean much, Doctor, very small.

A. You see I gave Mr. McKay $500 for the relinquishment, his relinquishment to this land that Mr. Gagnon used.

Q. You mean the scrip relinquishment?

A. Yes. And I gave—the relinquishments cost $800, so that it must have been small any way without any other expenses.

Mr. BLACK.—Q. You did not sell it at a loss, did you? A. No, sir.

(Testimony of G. W. Dwinnell.)

Q. Now, at that time and at the present time a man applies to the State for an exchange of land, it costs the applicant $1.25 an acre, does it not?

A. Yes, but now it costs him about $5 an acre for your scrip besides.

Q. That is when you get scrip that is on the market?

A. Yes, that is the only kind of scrip.

Q. But if a man now or at that time desired the State to make an exchange he would have to pay just $1.25 an acre for his scrip, would he not?

A. If he had already had land located in the permanent forest reserve that he had not paid for and should apply to the State for State lands, say section 16 or 36, if he already had applied for that himself, why then at that time he could change that over to the State for lands outside of the reservation for $1.25 an acre.

Q. And if he took his timber land and proved up on it it would cost him $2.50 an acre, would it not?

A. Yes

Q. If a man could get a hold of a piece of school land that had not been appropriated by getting the state to make the exchange he could save $1.25 an acre on the 160 or 640 that he would take up, couldn't he? A. Yes, but it is almost impossible—

Q. I am not asking you that. I am asking you if he could not do that? A. That is true.

Q. Did you tell the Frenches that they could relinquish and then take up another claim?

(Testimony of G. W. Dwinnell.)

A. When the Frenches sold theirs when they abandoned to the Government, they were in my office, 2 or 3 of them, and we were speaking about that, and I told them that I had seen a letter from the Register of the Land Office, Mr. Leininger, that said if there was any good reason for not proving up on their claims that they could have their rights restored, and I thought the fact they could not borrow this money would be a good reason.

Q. You did tell them that you thought it would be all right to make a relinquishment and that they could take up another claim?

A. I repeated just now what I told them.

Q. You spend your vacations looking over land, do you, Doctor? A. Yes.

Q. You have been dealing in land for about 20 years, haven't you?

A. No, sir, not in timber land.

Q. And very familiar with lands in that neighborhood? A. I am.

Mr. BLACK.—That is all.

[Testimony of David I. Mahoney, for the Defendants.]

DAVID I. MAHONEY, called as a witness for the defendants, being duly sworn, testified:

Mr. SCHLESINGER.—Q. Mr. Mahoney, how long have you been living in San Francisco, please?

A. All my life. I was born in San Francisco, going on 50 years.

Q. Did you know John D. Gagnon in his lifetime?

A. I did.

(Testimony of David I. Mahoney.)

Q. Now, don't answer this, until the Court has ruled: Did you know the general reputation of John D. Gagnon for truth, honesty and integrity in the community in which he resided?

Mr. BLACK.—I object to that as immaterial, irrelevant and imcompetent for any purpose connected with this case.

The COURT.—The objection will be sustained.

Mr. SCHLESINGER.—That is all. We take an exception.

Mr. SCHLESINGER.—That is the case for the defendants, if the Court please.

[Testimony of F. M. French, for the United States (in Rebuttal).]

F. M. FRENCH, recalled as a witness for the United States in rebuttal, testified:

Mr. BLACK.—Q. Mr. French, it has been testified here that Deter gave you $100 as a location fee. Will you explain to the jury whether you got $100 from Deter for locating him on that land?

A. Well, I got $100 from Deter but I gave it right back to Mr. Dwinnell.

Q. Did you also repeat that transaction with any of the other applicants? A. Yes, sir.

Q. With whom?

A. Well, I think Gavigan and Prather.

Q. Did Mr. Prather hand you $100?

A. Yes.

Q. What did you do with the $100?

A. I took it and gave it to Mr. Dwinnell.

(Testimony of F. M. French.)

Q. Did you have any conversation with Dr. Dwinnell in regard to that business?

A. Yes. Dr. Dwinnell said that the money was a little short and that probably that $100 would have to go around the crowd a number of times as locating fees, and after it had went three or four times I told him that I believed I had enough of it, that I would not circulate it any further.

Q. Then, did you as a matter of fact get a single dollar for locating any person on any of the lands mentioned in these applications except the cruising fee of $5 a day?

A. That is all I ever got. I never got one cent of locating fees that I appropriated to my own use; I took it back and gave it to Dr. Dwinnell.

Cross-examination.

Mr. SCHLESINGER.—Q. Didn't you owe Dr. Dwinnell $200?

A. I never owed him a cent.

[Testimony of C. M. Prather, for the United States (in Rebuttal).]

C. M. PRATHER, recalled as a witness for the United States in rebuttal, testified:

Mr. BLACK.—Q. Mr. Prather, did you ever pay any money to Mr. French for locating fees?

A. Yes, sir.

Q. Where did you get the money?

A. I got it from Dwinnell.

Q. How much? A. $100.

Mr. SCHLESINGER.—No questions.

The COURT.—Does that conclude the testimony?

Mr. BLACK.—That is the case for the Government, if the Court please.

[Recital Re Testimony and Evidence, etc.]

The foregoing contains all of the testimony and evidence, both oral and documentary, and a full statement of the proceedings in the case. At the close of the argument of the respective counsel the Court charged the jury as follows, and the following are all the instructions given by the Court to the jury:

[Instructions of the Court to the Jury.]

The COURT.— (Orally.) Gentlemen of the Jury, the defendants are charged in the indictment with the crime of conspiracy to commit the crime of subornation of perjury, and in a general way it is sufficient to say that that Indictment charges that the defendants, together with one John D. Gagnon, who is admitted to be dead, and with divers other persons to the Grand Jurors unknown, entered into a conspiracy to corruptly suborn James Frederich French, Benjamin F. French, Frederick M. French, Samuel L. French, and Clarence M. Prather, and Arthur W. Jacquette to commit the offense of perjury by appearing before the Register of the United States Land Office at Redding on the 31st day of October, 1906, and to take oath before the said Register in an application to purchase land.

And it is charged that each of the said persons, namely, the four Frenches, Prather, and Jacquette,

appeared before the said officer, and that each of them subscribed to, and took an oath and swore in substance that the application he was then making for land was made in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract or in any way or manner, with any person or persons whatsoever, by which the title he might acquire from the Government of the United States would inure in whole or in part to the benefit of any person except himself.

It is charged that each of the applicants so swearing knew that the oath he had taken was in fact wilfully false, and that the defendants and each of them knew the said oaths to be taken, and which it is alleged were in fact taken, would be, and were in fact, false in this, that each of the applicants when so swearing, had in fact made a prior agreement and had a prior understanding that the title he was to secure, and the land he applied for, was for the benefit of the defendants.

Section 5440 of the Revised Statutes of the United States declares, "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty as in the Statute provided."

It is necessary that at least two people must agree to commit the offense, and conspiracy is defined as follows:

"A conspiracy is the combining of two or more to do an unlawful or injurious act."

But it is not necessary that the conspiracy be successful. Under the law, it is sufficient if two or more persons combine to commit the offense and one or more of the persons so combining do any overt act to carry the conspiracy into effect. The moment the overt act is committed, the conspiracy becomes complete, no matter whether it be carried to a successful issue or not.

Perjury is defined as the wilful and corrupt swearing to any material matter or proceeding before any Court, tribunal or officer having authority to administer oaths.

Subornation of perjury is the procuring by any person or persons, of the commission of perjury by any person lawfully sworn to tell the truth in a material matter in any lawful proceeding in which an oath may be administered.

You are instructed that for the purpose of this case, the Register of the United States Land Office is a person entitled, under the law, to administer an oath in the matter of applications for land.

You are instructed that in an application to purchase timber land of the United States, it is material to know whether the applicant does in fact apply to purchase the land in good faith, and to appropriate it to his own exclusive use and benefit, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he may acquire from the Government of the United

States should inure in whole or in part to the benefit of any person except himself. And the statute says in express terms that the applicant must take the oath before the Register or Receiver of the Land Office, and if in taking such oath he shall swear falsely, he shall be subject to the pains and penalties of perjury.

It is not necessary, in order to justify a conviction of one defendant, that the jury should be satisfied beyond all reasonable doubt that all the defendants are guilty. It is sufficient, if the jury are satisfied beyond a reasonable doubt that any one or more of the defendants conspired with any one or more of the other defendants, or with any other person or persons, to commit the offense, alleged in the Indictment, and that one of the overt acts set forth in the Indictment was committed by any one of them to carry into effect the unlawful conspiracy, and in such case it would be the duty of the jury to find such defendant or defendants thus shown to have conspired guilty as charged. The jury has the right to find any particular defendant not guilty, or to disagree as to any particular defendant and to convict any two of the defendants found beyond all reasonable doubt to have so conspired together, or to convict any one of the defendants so found to have so conspired with any other person.

A relinquishment is not a conveyance or transfer of title from one person to another, but is a mere abandonment of the claim held by the claimant, the result of which is to restore the lands embraced in the relinquishment to the public domain.

The applicant who has in good faith applied for the purchase of timber lands in accordance with law for his own use and benefit and who has not at the time of making such application made directly or indirectly any agreement or contract in any way or manner with any person by which the title he might acquire shall inure in whole or in part to any person except himself, has the right at any time after making the application to relinquish his claim and to accept payment for his relinquishment. And in such case neither the applicant nor the purchaser of the relinquishment violates any law by such transaction.

The essence of the Indictment in this case is the charge that the defendants on or about the 25th day of October, 1906, wilfully knowingly, feloniously conspired, confederated and agreed together to commit the crime of subornation of perjury in the manner charged in the Indictment, and no matter what other facts may appear in this case, this specific charge must be proved by the prosecution beyond all reasonable doubt, and if not so proven by the evidence admitted, the defendants must be found not guilty.

Unless the evidence in this case is sufficient to convince the jurors to a moral certainty, that is, beyond all reasonable doubt, that the conspiracy was actually entered into by the defendants or two of them, or by one of the defendants and some other person, to instigate or procure the four Frenches, Jacquette and Prather, or some of them to appear at the Land Office in Redding, and falsely and corruptly make oath that they respectively had not directly or indirectly made any agreement or contract in any way

or manner with any person or persons whomsoever by which the title which he might acquire from the Government should inure in whole or in part to the benefit of any person except himself, the defendants must be acquitted.

I charge you that although you should believe from the evidence that the entrymen named in the Indictment did on or about the 31st day of October, 1906, commit the crime of perjury, as in said Indictment laid out, nevertheless, you cannot find the defendants guilty of the crime of conspiracy to commit the crime of subornation of perjury, unless you further find from the evidence, beyond all reasonable doubt, that they entered into a conspiracy to have such perjury committed. In other words, the evidence must convince your minds, beyond all reasonable doubt, before you can return a verdict of guilty, that the defendants conspired together or with some other person or persons to corruptly suborn, instigate or procure such entrymen to commit the crime of perjury as in said Indictment set out.

The law does not in any respect prevent a purchaser of public lands from the Government from selling his land or from relinquishing his location after the location is made. His right of relinquishment or sale is not restricted in the slightest degree. All that the law denounces is the prior agreement to sell or relinquish or acting for another in the purchase, of making application for the use and benefit of some other person.

I charge you in the same connection that the defendants had the perfect right to acquire the lands

of the entrymen after purchase from the Government, or had the perfect right to seek to acquire such lands from the entrymen, and you cannot find the defendants guilty, in this case, unless you find from the evidence, beyond all reasonable doubt, that at the time of, or prior to, the location of the lands by the entrymen that the defendants had conspired with them that the title which they would obtain from the Government should inure to their benefit or to the benefit of some of them, in other words, unless there was an agreement or understanding that the application to be made was to be made for the benefit of the defendants, or some of them.

I charge you, that in order to justify a verdict of guilty against one or more of the defendants found beyond all reasonable doubt to have conspired, as charged in the Indictment, it is not necessary that you should find that all of the applicants named in the Indictment were suborned to commit perjury, but it is sufficient for the purpose of this case if you find beyond a reasonable doubt that the defendants, or either of them, conspiring together or with any other person for the purpose, suborned any one of the applicants mentioned in the Indictment to commit perjury as alleged in the Indictment. In other words, it is as much a crime to suborn one person to commit perjury as it is to suborn two or more persons so to commit perjury.

In order to establish a conspiracy, evidence must be produced from which the jury may reasonably infer the joint assent of the minds of two or more persons to the prosecution of the unlawful enter-

prise, that is, they were acting together for the purpose of bringing about the unlawful result, but the joint assent of the minds of the parties to a conspiracy may be found by the jury, like any other ultimate fact, as an inference from the other facts proven. The evidence in proof of a conspiracy may be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that all the parties charged met together and came to an explicit and formal agreement for an unlawful scheme, or that they did directly, by words or in writing, state to each other what the unlawful scheme was to be, and state to each other the details of the plans and means by which the unlawful combination was to be made effective. The offense is sufficiently proved if the jury is satisfied that two or more of the parties charged in any manner, or through any contrivance, positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by one of the parties for the purpose of carrying it into execution. In other words, where an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a party to the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirator. It is not necessary that each of the parties should in person commit the unlawful act, if such act is a part of the plan for which the combination is formed, for

the unlawful agreement having been proven beyond a reasonable doubt, the act of one in furtherance of the conspiracy becomes the act of all.

You are further instructed that when once a conspiracy or combination is established, and a defendant's connection therewith is shown by independent evidence, then he is bound by the acts, declarations and statements of his co-conspirators, that is, while the conspiracy is in process of execution, because in that event, each is deemed to assent to, or command what is done by any other in furtherance of the common object.

Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact—inferences which common sense draws from circumstances usually occurring in such cases. Presumptions of facts are proved from circumstances or a particular case by means of the common experience of mankind. Men are presumed to act according to their own interests. It is presumed that regular and ordinary means are adopted for a given end; so, where the means calculated to attain a certain end appear to have been adopted, and the end itself appears to have been attained, it is presumed that the accomplishment of such end was intended.

It is a general presumption that a person intends whatever is *it* natural and probable consequences of his own actions, although this presumption is not a conclusive one, and it may be rebutted by the evidence or other circumstances occurring in the case.

It is not necessary to charge or prove all of the overt acts done or necessary to be done to render the object of the unlawful conspiracy effective, or to charge the unlawful conspiracy preceded to a successful termination, as designed by the defendants. It is enough, under any circumstances, unless interrupted, the conspiracy might have accomplished its unlawful purpose, and if the jury believe, after considering all the evidence that the unlawful conspiracy charged in the Indictment to have been entered into by the defendants, or any two of them, or by any one of them and any other person or persons, was entered into, and some of the overt acts set forth in the Indictment was done to carry it into effect, although the land contemplated by the agreement may not have been obtained, and the plan so to obtain it may have failed, the jury will nevertheless be justified in finding the defendants, participating in the conspiracy guilty as charged.

You are further instructed that in determining whether or not the conspiracy alleged in the indictment was formed you may take into consideration the acts of the parties in this case, the nature of those acts, their declarations or statements, whether verbal or in writing, made prior to October 31st, 1906, and the character of the transactions, or series of transactions with accompanying circumstances as the evidence may disclose them as sources from which evidence may be derived of the existence or non-existence of an agreement which may be expressed or implied to do the alleged unlawful act; and if, after considering all of such evidence, you are satisfied

that the conspiracy alleged in the Indictment was entered into by the defendants, or any two of them or any one of them with some other person or persons, and some one overt act mentioned in the Indictment was done to carry it out you *will justified,* although there may be no direct evidence of such conspiracy, in finding the defendants so participating guilty as charged.

The defendants have offered themselves as witnesses in their own behalf, and it is your duty to weigh their testimony carefully. In connection with this, I now charge you that you are the exclusive judges of the credibility of all the witnesses who have testified in your hearing, and also as to what facts have been proven in this case, and in judging of the testimony of witnesses, you will consider not only their manner upon the stand and the subject matter of their testimony, but you will also consider whether any of them had any motive which would probably induce them to swerve from the truth, or whether any witness has been impeached by proof, contradictory statements made out of court, contradicting testimony here given, or by proof that his reputation for truth, honesty and integrity was bad. In determining the value of the testimony of the defendants, or either of them, you are to look to the interest which they may have in the result of this trial. The law permits a defendant at his own request to testify in his own behalf. Each defendant has availed himself of that privilege, his testimony is before you, and you must determine how far it is credible, the deep personal interest which he may have in the

result of the trial should be considered by the jury in weighing his testimony, and in determining how far and to what extent it is worthy of credit. But you are not to reject his testimony simply because he is a defendant. You are to weigh his testimony fairly and impartially for the purpose of determining its credibility, and apply to it the same test that you do in considering the testimony of any other witnesses. You will look to his manner upon the stand, his motives, and all other facts and circumstances in the case which will enable you to form a conclusion as to whether or not he told the truth in giving his testimony. And if the testimony as given by the witness impresses you as being truthful, as a matter of course you must accept it and act upon it, and if that testimony satisfies you that he is not guilty, or if it raises in your mind any reasonable doubt as to his guilt, the defendant so testifying is entitled to the benefit of the doubt, and it would be your duty to return a verdict of not guilty as to such defendant.

The rules in reference to the presumption of innocence and the burden of proof are among the fundamental principles of our law, and must be regarded throughout your consideration of the evidence in this case. All presumptions of law independent of evidences are in favor of innocence, and every person is presumed to be innocent of the offense charged until he is proven guilty. If upon such proof there is a reasonable doubt remaining the accused is entitled to the benefit of an acquittal. Before you can convict, the Government must overcome the presumption of innocence by proving the defendants to be guilty

beyond a reasonable doubt, and if the jury have a reasonable doubt as to the guilt of either of the defendants, you should acquit as to that defendant.

You are further instructed that a reasonable doubt of the guilt of a defendant is a doubt based upon reason, and which is reasonable in view of all of the evidence—an honest, substantial misgiving, generated by insufficiency of proof, and not a capricious doubt, unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, or prompted by sympathy with him or those connected with him; it must be supported by reason and not by mere conjecture and idle supposition, irrespective of evidence. In other words, it must be a doubt which is honestly entertained by the jury after the consideration of all the evidence.

A reasonable doubt is not a mere whim, but is such a doubt as reasonable men may entertain after careful consideration of all the evidence in the case. It is such a doubt as reasonable men of sound judgment, without bias, prejudice or interest, after calmly, conscientiously and deliberately weighing the testimony, would entertain as to the guilt of the accused.

Something was said by counsel in regard to the punishment which the law affixes for the crime with which the defendants are charged.

You are charged that you have nothing to do with the matter of punishment, you are not to vote for a verdict of guilty on any belief that the defendants would be leniently dealt with. You are not to refuse to find a defendant guilty if you believe him to be

guilty because you may suppose that he may be severely dealt with. I will give you some additional instructions which perhaps may seem a repetition of those already given. You are to decide the case according to the evidence, and no other consideration should move you.

You are charged that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that the defendants are guilty than innocent.

To warrant a conviction the defendant must be proved to be guilty, so clearly and conclusively that there is not upon the facts shown by the evidence any reasonable theory upon which he can be innocent; and if the prosecution has failed to make such proof, the jury should find the defendants not guilty.

You, Gentlemen, as I have heretofore told you, are the exclusive judges of the weight of the evidence here, and the credibility of the witnesses. Under your oaths as jurors, you are to take into consideration only such evidence as has been admitted by the Court, and you should, in obedience to your oaths, disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to, and to which objections were sustained.

The defendant is to be tried only on the evidence which is before you, and not on suspicions that may have been excited by questions of counsel.

Every witness is presumed to speak the truth, but this presumption may be repelled by the manner in which a witness gives his testimony, by the character of the testimony offered, by the motives that may actuate a witness in offering his testimony, or by contradictory evidence, and any witness found by you to be wilfully false in a material part of his testimony is to be distrusted by you in other parts.

You are instructed that where circumstantial evidence is relied upon by the prosecution to support any part of its case, such evidence must exclude every other reasonable hypothesis than the guilt of the defendant, otherwise it will be insufficient. Or, stated in other words, in order to convict upon circumstantial evidence, the circumstances proved must not only be consistent with the guilt of the defendant, but it must be inconsistent with any other reasonable theory which can be predicated upon the testimony.

I charge you that in considering the evidence of any witness in this case, you have the right to take into consideration whether or not such witness, in becoming a witness for the prosecution, expects favors from such prosecution, or expects that he will be leniently dealt with in the disposition of his own case; and if you believe from the evidence facts or circumstances in the case that such witness expects favors from the prosecution, you have the right, and it is your duty, to take such facts into consideration in weighing his testimony. That will go simply to the question of the motive which may actuate him in testifying.

Was there any evidence of good character in relation to any defendant except one?

Mr. SCHLESINGER.—I believe only one—no, two. I think one witness testified as to all three, now I come to think of it.

The COURT.—I do not remember whether there was any testimony in relation to any of the other defendants than Dwinnell. You, Gentlemen, will have to remember that for yourselves. This instruction is only applicable to the defendant in relation to which such evidence was given.

The defendants have introduced evidence of good character for truth, honesty, and integrity. If you believe from the evidence that the good character of the defendants for truth, honesty and integrity is proven to your satisfaction, then such fact is to be kept in view by you throughout all your deliberation, and it is to be considered by you in connection with the other facts in the case, and given such weight as you think it is entitled to. If, after consideration of all the evidence you believe that any defendant is guilty as charged, why, then, it will be your duty to return a verdict of guilty, notwithstanding proof of good character.

You are charged that a witness may be impeached by evidence that he has made at other times statements inconsistent with his present testimony.

I repeat, quoting from the code of this State, you are charged with the presumption that a witness speaks the truth may be removed or repelled, by the manner in which the witness testifies, by the character of his testimony, or by evidence affecting his

character for truth, honesty or integrity, or by his motives for testifying or by contradictory evidence, and in this connection I charge you that you are the exclusive judges of the credibility of any witness in this case.

In other words, you must determine for yourselves whether you believe the testimony of any witness or not, and accordingly, as you believe, you will act.

With these instructions, you may retire, Gentlemen, and deliberate on your verdict.

[Instructions Requested by Defendants and Refused.]

The defendants requested certain instructions before the argument and in due time the defendants, George W. Dwinnell and John Gilpin, requested the Court to give certain instructions as follows, to wit:

"I charge you that unless you find from the evidence, beyond all reasonable doubt, that the entrymen before their applications had unlawfully or fraudulently made an agreement with the defendants by which the title they, the entrymen, would acquire from the United States, should inure to the benefit of the defendants, it would be your duty to return a verdict of not guilty."

The Court refused to give said instructions, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

"I instruct you that the Indictment filed herein gives rise to no presumption of the guilt of the defendants of the offense charged therein, nor does

such Indictment give rise to any presumption against the defendants of any kind whatever.

I further instruct you that such Indictment is not evidence or proof in any sense and must not be considered or treated or acted upon by you as evidence or proof against the defendants."

The Court refused to give said instructions and the defendants, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

"I instruct you that where circumstantial evidence is relied upon by the prosecution to support any part of its case, such evidence must exclude every other reasonable hypothesis than the guilt of the defendant, otherwise it will be insufficient.

That, in summing up the evidence, if you find any reasonable explanation of any circumstances, relied upon by the prosecution against the defendant, inconsistent with defendants' guilt, you must find the defendants not guilty."

The Court refused to give said instruction and the defendants, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

"If the jury are satisfied from the evidence that the defendants have established a good character for truth, honesty and integrity, then such good character of itself may be sufficient to raise a doubt as to the defendants' guilt."

The Court refused to give said instruction and the defendants, before the retirement of the jury and

within the time allowed by law and the rules of the Court, duly excepted to such refusal.

The defendants in this case have introduced evidence of their good character for truth, honesty and integrity. If you believe from the evidence that the good character of the defendants for truth, honesty and integrity is proven to your satisfaction, then such fact is to be kept in view by you throughout all your deliberations, and it is to be considered by you in connection with the other facts in the case, and if, after a consideration of all of the evidence in the case, including that bearing upon the good character of the defendants, you entertain any reasonable doubt of the defendants' guilt, then it is your duty to return a verdict of not guilty."

The Court refused to give said instructions, and the defendants, before the retirement of the jury and within the time allowed by law and the rules of the court, duly excepted to such refusal.

"I charge you that if you find from the evidence in this case that any witness have wilfully testified falsely as to any material matter involved in the case, it is your duty, under the law of this State, to distrust the entire testimony of such witness."

The Court refused to give said instruction and the defendants, before the retirement of the jury and within the time allowed by law and the rules of the court, duly excepted to such refusal.

"I charge you to return a verdict of not guilty in this case for the reason that the evidence does not warrant the submission of the case to the jury."

The Court refused to give said instruction and the defendants, before the retirement of the jury and within the time allowed by law and the rules of the court, duly excepted to such refusal.

"I advise you to return a verdict of not guilty in this case because of the insufficiency of the evidence given by the Government."

The Court refused to give said instruction and the defendants, before the retirement of the jury and within the time allowed by law and the rules of the court, duly excepted to such refusal.

"I charge you that in considering the weight to be given by you to the testimony of any witness in this case you have the right to take into consideration the animus or the bias of such witness, if such animus or bias appears."

The Court refused to give said instruction and the defendants, before the retirement of the jury and within the time allowed by law and the rules of the court, duly excepted to such refusal.

After the jury had returned a verdict of guilty the Court set the 13th day of November, 1909, as the day of sentence. Before sentence was imposed upon the defendants, the defendants presented the following motion in arrest of Judgment:

In the District Court of the United States, in and for the Northern District of California.

No. 4630.

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,

Defendants.

Motion to Arrest Judgment [in Bill of Exceptions].

The defendants in the above-entitled cause, before Judgment, respectfully move the Court that for error appearing on the face of the Indictment and upon the face of the record, that Judgment for the Government be arrested and withheld and the conviction rendered herein be declared null and void.

Said motion is based on the following grounds:

(1) That the Indictment herein fails to charge the offense of conspiracy to commit the crime of subornation of perjury against the United States.

(2) That the Indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

(3) That the Indictment fails to charge that any public lands of the United States were the subject of any conspiracy.

(4) That the Indictment fails to charge that the entrymen had applied to purchase any public lands of the United States over which the Register and Receiver of the Land Office at Redding, California, had jurisdiction.

(5) That the Indictment fails to charge that the entrymen had applied to purchase any public lands situated within the Shasta or Redding Land District of the United States.

(6) That the Indictment fails to charge that any application was to be made to purchase any public lands of the United States within the land District over which the Register therein named had any jurisdiction.

(7) The Indictment fails to charge that the entrymen were to be induced, or were induced, or procured, to make entries of public lands of the United States within the Shasta or Redding Land Districts, or within any district over which the Register therein mentioned had jurisdiction.

(8) That the Indictment fails to charge that the alleged perjury, or subornation of perjury, was to occur in any proceedings for the entry or purchase of land situated in the Shasta or Redding Land Districts under the Timber and Stone Act.

(9) That the Indictment fails to charge that the sworn statements referred to therein were to be verified by the oaths of the applicants before the Register or Receiver of any Land Office within the District where the lands were situated.

(10) That the Indictment fails to show that any lands were subject to entry at the land office at Shasta or Redding, or were subject to entry before said Register.

(11) The Indictment fails to show or state a case in which any oath was required or permitted to be administered by such Receiver, as it does not show

that such Register had jurisdiction over the matters therein referred to.

(12) The Indictment does not show that public lands of the United States were to be entered or purchased.

(13) The Indictment does not show that the said Clarence W. Leninger had due or competent authority, or any authority, to administer any oath to any of the entrymen in the indictment referred to.

(14) The Indictment does not show that the said Leninger was to administer an oath concerning lands situate within the District over which he had jurisdiction.

Wherefore, defendants pray that said Judgment be arrested and that no sentence be had therein.

And will ever pray.

R. S. TAYLOR,
S. C. DENSON,
BERT SCHLESINGER,
Attorneys for Defendants.

The defendants, George W. Dwinnell and John Gilpin, hereby present the foregoing as their Bill of Exceptions herein, and respectfully ask that the same may be allowed, signed, sealed and made a part of the records in this case.

R. S. TAYLOR,
S. C. DENSON,
BERT SCHLESINGER,
Attorneys for Defendants, George W. Dwinnell and John Gilpin.

Dated January 10, 1910.

[Notice of Presentation of Bill of Exceptions.]

To Robert T. Devlin, Esq., United States Attorney, Northern District of California, and to A. P. Black, Esq., Assistant United States Attorney.

You will please take notice that the foregoing constitute and is the proposed Bill of Exceptions of the defendants, George W. Dwinnell and John Gilpin, in the above-entitled cause, and the said defendants George W. Dwinnell and John Gilpin will apply to the said Court to allow said Bill of Exceptions and to sign and seal the same as the Bill of Exceptions herein.

R. S. TAYLOR,
S. C. DENSON,
BERT SCHLESINGER,
Attorneys for Defendants, George W. Dwinnell, and John Gilpin.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated and agreed that the foregoing Bill of Exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

ROBT. T. DEVLIN,
United States Attorney,
A. P. BLACK,
Asst. United States Attorney,
Attorneys for the United States.
R. S. TAYLOR,
S. C. DENSON,
BERT SCHLESINGER,
Attorneys for Defendants, George W. Dwinnell and John Gilpin.

Dated February 9th, 1910.

Order Making Bill of Exceptions Part of the Record.

This Bill of Exceptions having been duly presented to the Court within the time allowed by law and the rules of the court and within the time extended by Order of the Court duly and regularly made, is now signed, sealed and made a part of the Records in the case, and is allowed as correct.

JOHN J. DE HAVEN,
Judge of the District Court of the United States,
Northern District of California, Ninth Circuit.

March 1, 1910.

Due service of the within Proposed Bill of Exceptions of Defts., Dwinnell & Gilpin, by copy hereby admitted this 10th day of January, 1910.

ROBT. T. DEVLIN,
A. P. BLACK,
Attorneys for United States.

[Endorsed]: Received Febry. 9, 1910, and filed Mar. 1, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Fixing Amount of Bail and of Cost-Bond.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Monday the 15th day of November, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 4630.

UNITED STATES OF AMERICA.

vs.

GEORGE W. DWINNELL and JOHN GILPIN.

On motion of Bert Schlesinger, Esqr., Atty., for defendants, by the Court ordered that the bail of each of said defendants on Writ of Error herein, be, and the same is hereby fixed in the sum of $3,000. Further ordered that the cost bond as to each of said defendants on said Writ of Error be, and the same is hereby, fixed in the sum of $250.

In the District Court of the United States, in and for the Northern District of California.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE *A.* DWINNELL, JOHN GILPIN, GEORGE D. GAGNON and REX F. DETER,

Defendants.

Writ of Error [Original].

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between George W. Dwinnell and John Gilpin, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said George W. Dwinnell and John Gilpin, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 15th day of November, in the year of our Lord one thousand nine hundred and nine.

[Seal] JAS. P. BROWN,
Clerk of the United States District Court, Northern District of California.

By Francis Krull,
Deputy Clerk.

Allowed by:

JOHN J. DE HAVEN,
Judge.

Nov. 15, 1909.

[Endorsed]: No. 4630. In the District Court of the United States, in and for the Northern District of California. United States of America vs. George W. Dwinnell, John Gilpin et al., Defendants. Original Writ of Error. Filed Nov. 15, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

Return to Writ of Error [Original].

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the Within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 15th day of November, A. D. 1909, duly lodged in the case in this court for the within named defendants in error.

By the Court:

[Seal] JAS. P. BROWN,

Clerk United States District Court, Northern District of California.

By M. T. Scott,
Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4630.

UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL, JOHN GILPIN, GEORGE D. GAGNON, and REX F. DETER,

Defendants.

Writ of Error [Copy].

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the Judgment of a plea which is in the said District Court, before you, or some of you, between George W. Dwinnell, and John Gilpin, plaintiffs in error, and the United States of America, defendant in error, a manifest error has happened, to the great damage of the said George W. Dwinnell

and John Gilpin, plaintiffs in error, as by their Complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if Judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 15th day of November, in the year of our Lord one thousand nine hundred and nine.

[Seal] JAS. P. BROWN,
Clerk of the United States District Court Northern District of California.

By Francis Krull,
Deputy Clerk.

Allowed by:

JOHN J. DE HAVEN,
Judge.

Nov. 15, 1909.

[Endorsed]: Filed Nov. 15, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein George A. Dwinnell and John Gilpin are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, this 15th day of November, A. D. 1909.

JOHN J. DE HAVEN,
United States District Judge.

Service admitted this 15th day of November, 1909.

ROBT. T. DEVLIN,
U. S. District Attorney.

[Endorsed]: No. 4630. U. S. Circuit Court of Appeals, for the Ninth Circuit. George A. Dwinnell and John Gilpin, Plaintiffs in Error, vs. United States of America. Citation on Writ of Error. Filed November 15th, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

Citation on Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein George A. Dwinnell and John Gilpin are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern Dis-

trict of California, this 15th day of November, A. D. 1909.

JOHN J. DE HAVEN,
United States District Judge.

Service admitted this 15th day of November, 1909.

ROBT. T. DEVLIN,
U. S. District Attorney.

[Endorsed]: Filed November 15th, 1909. Jas. P. Brown, Clerk. By M. T. Thomas Scott, Deputy Clerk.

[Stipulation and Order Re Original Exhibits.]

In the District Court of the United States for the Northern District of California.

No. ——

THE UNITED STATES OF AMERICA

vs.

GEORGE W. DWINNELL, and JOHN GILPIN,
Defendants and Plaintiffs in Error.

It is hereby stipulated and agreed that the Clerk of the above-named court need not transmit a certified copy or any copy of the original exhibits in the above-entitled cause to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reason that a true and correct copy of all the said exhibits are contained and set forth in the bill of exceptions in said cause that has been settled and filed herein; that if necessary the original exhibits may be referred

to and procured from the clerk at the argument or hearing of said cause in said Appellate Court.

Dated, San Francisco, Cal., May 31st, 1910.

R. S. TAYLOR,
S. C. DENSON,
BERT SCHLESINGER,
Attorneys for Defendants Above Named.

ROBT. T. DEVLIN,
U. S. District Attorney for the Northern District of California.

So ordered.

MORROW,
U. S. Circuit Judge.

[Endorsed]: Filed May 31st, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Record.]

United States of America,
Northern District of California,—ss.

I, James P. Brown, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, that the foregoing three hundred and twenty-seven pages, numbered from 1 to 327, inclusive, form a true and complete transcript of the record, proceedings, pleadings, orders, and judgments in said case, and the whole thereof, as appears from the original record and files of said court, made up pursuant to praecipe filed by Plain-

tiff in Error. And I further certify and return that I have annexed to said transcript, and included within said paging the original citation, and Writ of Error.

I further certify that a true copy of the Writ of Error was lodged with me for the defendant in error on November 15th, 1909.

I further certify that the cost of said record, amounting to one hundred eighty-one dollars and ten cents ($181.10), has been paid by plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at San Francisco, in the Northern District of California, this 11th day of June, A. D. 1910, and of the Independence of the United States of America, the one hundred and thirty-fourth.

[Seal] JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1865. United States Circuit Court of Appeals for the Ninth Circuit. George W. Dwinnell and John Gilpin (Defendants), Plaintiffs in Error, vs. The United States of America (Plaintiff), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court, for the Northern District of California.

Filed June 15, 1910.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

No. 1865.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE W. DWINNELL and JOHN GILPIN,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Plaintiffs in Error.

Filed this . . . . . day of October, 1910.

. . . . . , Clerk.

By . . . . . , Deputy.

Whitaker & Ray-Wiggin Co., 770-776 Mission St.

No. 1865.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE W. DWINNELL and JOHN GILPIN,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR.

GENERAL STATEMENT OF THE CASE.

The plaintiffs in error, George W. Dwinnell and John Gilpin, were tried and convicted in the District Court of the United States in and for the Northern District of California under an indictment returned by the Federal Grand Jury October 30, 1908, charging

them, together with Rex F. Deter and John Gagnon, with having committed the offense of conspiracy to commit the crime of subornation of perjury against the United States.

On the trial it appeared that the defendant John Gagnon had died after the finding of the indictment.

The Jury found the defendant Rex F. Deter not guilty, but found the plaintiffs in error guilty.

From the judgment upon such conviction and from orders of the trial Court denying a motion for a new trial and a motion in arrest of judgment, plaintiffs in error bring their cause to this Court relying upon certain assignments of error for a reversal of the judgment herein, which said assignments of error appear in the transcript of the record in this cause, and are herein specifically referred to.

SPECIFICATIONS OF ERROR.

The defendants when arraigned demurred to the indictment. (Trans., pp. 16 to 18.) The Court overruled the demurrer (Trans., p. 19), and in doing so filed a written opinion. (Trans., pp. 20 to 22.) Our first assignment of error is that the Court erred in overruling the demurrer to the indictment. (Trans., p. 41; Point I of Brief.)

Our second assignment of error is that the Court erred in refusing to advise the jury to return a verdict of "not guilty." (Trans., p. 42, Assignments of Error V and VI; Point II of Brief.)

Our third assignment of error is that the Court erred in refusing to give the following instructions to the jury requested by the defendants:

(a) "If the jury are satisfied from the evidence that the defendants have established a good character for truth, honesty and integrity, then such good character of itself may be sufficient to raise a doubt as to the defendants' guilt." (Trans., p. 41, Instruction No. 37; Point III of Brief.)

(b) "The defendants in this case have introduced evidence of their good character for truth, honesty and integrity. If you believe from the evidence that the good character of the defendants for truth, honesty and integrity is proven to your satisfaction, then such fact is to be kept in view by you throughout all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendants, you entertain any reasonable doubt of the defendants' guilt then it is your duty to return a verdict of 'not guilty'." (Trans., p. 42, Instruction No. 38; Point III of Brief.)

Our fourth assignment of error is that the Court erred in overruling the defendants' objection to the question, "Did you ever hear the defendant, Dr. "Dwinnell's, reputation for truth, honesty and in- "tegrity questioned in regard to land matters." (Trans., pp. 48 and 192; Point IV of Brief.)

Our fifth assignment of error is that the Court erred in refusing to admit the introduction by defendants of testimony to show the good reputation of John D. Gagnon. (Trans., pp. 48 and 245; Point V of Brief.

Our sixth assignment of error is that the Court erred in denying defendants' motion for a new trial. (Trans., p. 43; Point VI of Brief.)

Our seventh assignment of error is that the Court erred in denying defendants' motion in arrest of judgment. (Trans., p. 43; Point VII of Brief.)

Our eighth assignment of error is that the Court erred in rendering judgment against the defendants. (Trans., p. 49; Point VIII of Brief.)

Our ninth assignment of error is that the court erred in overruling defendants' objection to the introduction in evidence of relinquishments. (Trans., pp. 46, 69, 103, 150. Point IX of Brief.)

The ninth, tenth, eleventh and twelfth assignments of error (Trans., pp. 46, 69, 128, 103 and 150) relate to the admission in evidence of certain relinquishments and of conversations concerning the filing of such relinquishments. This testimony was admitted in face of numerous and persistent objections on the part of the plaintiff in error and we contend that under the recent United States Supreme Court decisions of Williamson vs. U. S., 207 U. S. 425, and Biggs vs. U. S., 29 Sup. Ct. Rep. 184, October term, 1908, the admission of this testimony constituted fatal error. This point, however, is discussed at length and in detail under assignment of this brief commencing with page 60.

I.

THE COURT ERRED IN OVERRULING THE DEMURRER TO THE INDICTMENT.

A. BECAUSE THE INDICTMENT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CRIME AGAINST THE UNITED STATES.

The indictment beginning on page 5 of the transcript of record in substance charges:

That the defendants, * * * October 25, 1906, * * * in Siskiyou County, California, * * * did conspire * * * to commit the crime of subornation of perjury against the United States * * * committed as follows: Said defendants did * * * conspire * * * to suborn, instigate and procure James Frederick French and five others named to commit the offense of perjury * * * by appearing before Land Register Leininger at Redding on October 31, 1906, and respectively take oath to a sworn statement under the Timber and Stone Land Acts of the United States in which sworn statements each of the affiants so named should swear that he did not apply to purchase the land described in said sworn statement for speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract or in any way or manner with any person * * * by which the title he might acquire from the Government of the United States would enure in whole or in part to the benefit of any person except himself; which said sworn statement after being sworn to would be filed * * * by each of said persons respectively and which sworn statement so to be sworn to and filed should be known by each of said applicants to be false in the material matter therein to be sworn to—in this: THAT EACH OF THE SAID APPLICANTS AT THE TIME HE WAS SWEARING HAD AN AGREEMENT

BEFOREHAND AND AN EXPRESS UNDERSTANDING; THAT THE TITLE HE WAS TO SECURE (and the land he was to apply for) was for the benefit of the said defendants and the defendants all the time knew that the said sworn statements so to be filed would be wilfully FALSE IN THE SAID MATERIAL MATTER JUST BEFORE STATED.

We have included the words "and the land he was to apply for" in parenthesis to point out the fact that these words were not included in the sworn statements and not in the Statute which sets forth what oath must be taken in such case.

The foregoing is the substance of the charge of conspiracy contained in the indictment.

THE INDICTMENT DOES NOT CHARGE THAT ANY OF THE LANDS WERE PUBLIC LANDS OF THE UNITED STATES.

The charging part of the indictment is to be found on page 6 of the Transcript and terminates at the top of page 8.

In Hayes vs. United States, 101 Fed. 819, the Circuit Court of Appeals declared invalid an indictment lacking the elements here pointed out. The Court, in that case said, "The first count in the indictment fails to "describe any of the acts which constituted the con- "spiracy. It does not charge what lands Gifford was "prevented from entering, NOR THAT THEY "WERE PUBLIC LANDS. This count is there- "fore clearly bad and no conviction thereunder can "be sustained."

It will be noticed that the indictment in the case at

bar does not describe the lands as being in any certain County, or located in certain Township, nor does it even refer to the lands (the alleged subject of the conspiracy) as being lands of the United States. The indictment does not show whether these lands were situated in this country. They may have been situated, for all that appears in the indictment, in some foreign country, and this leads us to another point in the same connection.

A. THERE IS NO ALLEGATION IN THE INDICTMENT THAT ANY OF THE LANDS WERE SUBJECT TO ENTRY AT THE REDDING LAND OFFICE.

If these lands were not so subject to entry, then the alleged false swearing was not material. The authority of the receiver to administer an oath is confined to applications for land within his district. If a Register of the Shasta Land District he would have no authority to administer an oath to the applicant of public lands in the Marysville district, or in the Sacramento district, or in the San Francisco district, or in the Oklahoma district.

If the sworn statement should be for lands in some district other than the one over which he has jurisdiction, he would have no power to administer the oath, nor would he have power to receive a sworn statement covering any land not within his district.

It does not appear anywhere in the indictment that the entrymen were to apply for any public lands within the Shasta Land District, or that the sworn statements filed by the entrymen were for public lands

within that district, or that they were for public lands within the State of California, hence the jurisdiction or authority of the receiver or register does not appear affirmatively or otherwise. More especially is this true as there is no statement in the indictment that Leininger, the registrar, was authorized to administer an oath in any case where the laws of the United States would authorize an oath to be administered.

The following *public land provisions* conclusively show that the indictment is defective in the particulars enumerated.

Section 2256 of the Revised Statutes (6 Fed. Stat., Annotated page 236) establishes the boundaries of 93 land districts, the section reading: "The following "boundaries of the 93 land districts with the location "of the respective land offices are established until "changed in pursuance of the law."

Number 42 is the Shasta Land District, lands district bounded as follows:

> "Beginning on the northern boundary of the State of California, where the line ranges between 10 and 11 M. D. M. intersects State boundary; thence east of said boundary to the intersection of the line between ranges 5 and 6 East."

Section 2234 provides: "That there shall be ap- "pointed by the President, by and with the advice and "consent of the Senate, a register of the land office "and a receiver of public moneys for each land district "established by law, who shall have charge of and "attend to the sale of public lands *within their respec-* "*tive districts.*"

Section 2246 provides: "That the register or re-
" ceiver is authorized and it shall be their duty to ad-
" minister any oath required by law in connection with
" the entry or purchase of any tract of the public
" lands."

Under Subdivision 2 of the Timber and Stone Act, page 1546, vol. 2, U. S. Compiled Statutes, in providing for the statement "that he has not directly, or indirectly, made any agreement or contract in any way or manner, etc.," which *statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situate* and if any person taking such oath swear falsely in the premises, etc.

We have been unable to find a case of this character in which the indictments, omitting some description of the lands, were upheld by the Courts.

In Dealey vs. United States, 153 U. S. 539, the indictment was severely criticized for insufficiency of description. Nevertheless the description was "large
" tracts of land in the County of Rollette, State of
" North Dakota, said lands being public lands of the
" United States open to entry under the homestead
" laws at the local land office of the United States at
" Devils Lake City in said State." The Court held that notwithstanding that no tract was named by number of section, township and range the language was broad enough to include any public lands within that county *subject to homestead entry* at that *land office.* Said the Court: "It is enough that their purpose and
" their conspiracy had in view the acquiring of some
" of *those lands* and it is not essential to the crime that

" in the minds of the conspirators the precise lands had " already been identified."

The indictment in this case does not show that the defendants had agreed to acquire any public lands subject to entry at the office of the Shasta Land District. We concede that the *particular tract of land selected need not be described,* but the indictment should have CONTAINED AN ALLEGATION that defendants had in view the acquirement of public lands and that these *public lands* were situate within *Shasta County,* and subject to entry in the *land office of that county.*

In the case at bar, however, we are not told where the lands were situated, whether in San Francisco County or Shasta County; whether in California or New York; whether in the United States or Mexico.

In Nurenberg vs. United States, 156 Fed. 724, the allegations of the indictment in the particulars referred to here were assailed. The allegations were: " *Did instigate and procure one Chas. S. Ely to appear* " *in person before the register and receiver to make and* " *subscribe before him,* the said Fox, receiver, as afore- " said, a certain oath and affidavit, *then and there re-* " *quired by the laws of the said United States* in sup- " port of a certain application in writing of him, then " and there made to the register of the said land office, " that is to say, a certain application, in writing to enter " under the Homestead Laws of the United States, *sub-* " *ject to entry at the said land office.*" (Here is set out " a description of the land.) "And by such oath so " made to enter the said lands."

Then there is an allegation: "He, the said Fox, then "and there being such receiver, as aforesaid, and hav- "ing due and competent authority to administer such "oath to said Ely."

The indictment in the case at bar omits the description of the lands; does not state that the lands were public lands; does not state that they were situated within that district; does not state that they were situated within the United States; does not state that they were subject to entry at the land office at Redding; and does not state that Leininger, the register mentioned in the indictment, had any authority to administer the oath to the entrymen.

The allegations in the Nurenberg case are quite full and complete as compared with the allegations in the indictment here under consideration. Nevertheless in the Nurenberg case the indictment was criticised as being inartificially drawn. In that case we have a case perhaps of insufficiency of description. In the case at bar an essential element of the offense is omitted. Ours is a case of complete absence of description, of complete absence of attempted description and is defective not only in mere matters of form but in substance. It is fatally defective in that (a) it fails to show any authority on the part of the officer to administer the oath; (b) it fails to show that any property of the United States was the subject of the alleged conspiracy.

If this indictment may be upheld, the District Attorney in all future indictments might well omit all allegations from his indictment and content himself with simply naming the defendant.

There is nothing in the charging part of the indictment by which it can even be inferred that Leininger had power to administer the oath in question. The indictment does not state that he had any such power, nor does it state that the lands (not public lands) were within his district. The register or receiver has power only to administer an oath to the applicant within the district where the land is situated and over which he has jurisdiction.

The indictment here does not charge that the land is any portion of the lands embraced within district number 42 of the Shasta Land District, and the United States is not charged with ownership.

All of the cases recognize the principle, that the failure to allege that the lands were public land subject to entry is a fatal defect, and should be held defective on a motion in arrest of judgment. The demurrer in this case sufficiently covers all of these grounds. (Trans., p. 31-18.)

There is no allegation in the indictment that the oath was administered in a case in which the laws of the United States authorized the oath to be administered, and the law does not authorize the oath to be administered unless the lands were situated in the particular district presided over by the officer administering the oath.

In the Nurenberg case, 156 Fed. 724, the allegation clearly disclosed that the applicants were to make entry of homestead lands *specifically described under the homestead laws of the United States subject to entry at the United States Land Office at Meno, North Dakota.*

Tested by the principle laid down by all the authorities and particularly in Hayes vs. United States, 101 Fed. 819, *supra,* this indictment cannot escape condemnation.

The indictment in the case at bar fails to state that these lands were subject to entry at the United States Land Office at Redding.

In the Williamson indictment, 207 U. S. Supreme Court 425, we find this allegation: "The suborning "of a large number of persons to go before a named "person, stated to be a United States Commissioner of "the District of Oregon and in *proceedings for the pur-* "*chase and entry of land in such district.*" The indictment described the lands and was sufficient in that regard. The case was reversed on other grounds.

This indictment was found under Section 5440 R. S. of U. S., which provides that "if any two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties, do any act to effect the object of conspiracy," etc. It will thus be seen that in addition to the common law conspiracy the Statute requires the commission of an overt act to constitute a crime. This is called by some writers the *locus penitentiae,* or period of repentance; that is, that between the period of the consummation of the conspiracy and the time of the overt act in furtherance thereof there is a period of repentance, or to put it in still another way, no offense can be committed until the period of repentance is exhausted by the commission of an overt act. The conspiracy, however, must be as clearly and distinctly charged in an

indictment under the Statute as at common law where no overt act was required. This is the reason for rule laid down in

United States vs. Britton, 108 U. S. 109.

With this distinction clearly in mind, let us examine the indictment.

To begin with, it charges a conspiracy; but that alone is not sufficient under the statute. It must be a conspiracy to commit a crime and the crime charged is subornation of perjury. In setting forth the crime of subornation of perjury in an indictment, the perjury must be as fully charged as if it were an indictment for that crime itself.

Coming back again to the indictment in question, we find that the only perjury set forth in the charging part (which is all found on pp. 6 and 7 and the first two lines of p. 8, transcript) is the taking of the oath required in the Timber and Stone application to the effect that the applicant did not apply to purchase on speculation, etc., and that he had not made a contract by which the TITLE HE MIGHT ACQUIRE FROM THE GOVERNMENT OF THE UNITED STATES would inure to another, and that "said sworn statements should be known by each of the applicants to be false in this that each of the persons at the time of so subscribing * * * had an agreement beforehand and an express understanding THAT THE TITLE HE WAS TO SECURE was for the benefit of said defendants." We have not included the words "land he was to apply for" in the statement of the charge for the reason that an affidavit to such ef-

fect is not contemplated by the Timber and Stone Act, and for the further reason that in legal effect the expression is synonymous with the words "title he was to acquire." Such was the view taken by the trial Court, for it was held in the opinion on the demurrer that no crime had been charged of making dummy applications, or attempting to defraud the Government, nor had an offense been stated under the first clause of the Timber and Stone Act relating to purchase on speculation. The Court said: "It will be observed that the conspiracy, as charged in the indictment lies within very narrow limits." "The indictment DOES NOT CHARGE THAT THE DEFENDANTS CONSPIRED TO DEFRAUD THE UNITED STATES by procuring the persons named in the indictment to cover the land applied for with dummy or temporary applications for the purpose of obstructing or preventing the entry of such land by BONA FIDE applicants and which dummy applications were to be relinquished upon the request of the defendants, NOR DOES IT CHARGE that the defendants entered into a conspiracy to suborn the persons filing such dummy applications to commit perjury in swearing to that part of their respective applications which recites that the applicant does not apply to purchase ON SPECULATION, BUT IN GOOD FAITH TO APPROPRIATE IT TO HIS OWN EXCLUSIVE USE AND BENEFIT."

There is, therefore, no doubt but that the charging part of the indictment limits the same to a contract for the transfer of title, and this the trial Court so correctly held.

Having clearly in mind then that the indictment charges that these entrymen had an agreement and an express understanding prior to the time that they made their entry upon the several pieces of land that THE TITLE WHICH THEY WERE TO ACQUIRE FROM THE GOVERNMENT should go to the defendants, or at least to some persons other than themselves, let us examine the allegations of overt acts and ascertain whether they are in furtherance of such alleged agreement. They are that the defendants did cause the entrymen to go to the land office in Redding, stand in line, etc., to take their oath and to make their filings, and further (the same being the ultimate culminating overt act into which all prior acts were merged) that said Dwinnell did procure relinquishments from said applicants and did pay Two Hundred Dollars therefor "AS THE PRICE THERETOFORE AGREED UPON BEFORE THE FILING OF THE SAID APPLICATIONS IN THE UNITED STATES LAND OFFICE AS AFORESAID FOR WHICH THE SAID (applicant) WAS TO TAKE UP THE LAND AND MAKE HIS SWORN STATEMENT FOR THE BENEFIT OF SAID GEORGE W. DWINNELL.

Can anything then be clearer than that the conspiracy charged in the indictment was an agreement by which the applicants were to acquire title to the land and then convey the same to defendant, while in the overt act set out, the applicants were to acquire no title at all and therefore were to transfer nothing to the defendant or defendants?

The Government was held to the charge as laid and to the statement of overt acts as alleged in the indictment. One contradicted the other. One showed an agreement of one nature ENTERED INTO, while the other showed an agreement of an entirely different nature PERFORMED.

Such an indictment is fatally defective, should have been so held by the trial Court and should now be so held by this Court.

This is an obvious proposition and we should not incumber the record with authority, but we cite:

Commonwealth vs. Dean, 109 Mass. 349.

B. THE INDICTMENT IS FURTHER DEFECTIVE IN THAT IT FAILS TO CHARGE WHAT LANDS THE PERJURY ALLUDED TO, OR THAT THE OATH WAS TO BE TAKEN BY THE REGISTER OR RECEIVER OF THE LAND OFFICE WITHIN THE DISTRICT WHERE THE LAND IS SITUATED.

The Timber and Stone Act provides "that any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate * * * designating BY LEGAL SUBDIVISIONS THE PARTICULAR TRACT OF LAND HE DESIRES TO PURCHASE * * * which statement MUST be verified by the oath of the applicant before the register or the receiver of the land office WITHIN THE DISTRICT WHERE THE LAND IS SITUATED."

The language of the act is clear and explicit, and in charging the conspiracy, the description of the land,

so that it may be determined to be within the Redding Land District, is as essential as any other element of the crime.

The indictment is divided into, first, the charging part in which is set forth the common law offense of conspiracy, and, second, the allegations of overt acts.

In order that the Court may have before it the crime charged in the indictment, we herewith print that part of the indictment charging the offense.

> "The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath present; That
>
> GEORGE W. DWINNELL, JOHN GILPIN, JOHN D. GAGNON and REX F. DETER,
>
> hereinafter called the 'defendants', each late of the Northern District of California, heretofore, to-wit, on or about the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and six, in the County of Siskiyou, in the State and Northern District of California, then and there being, did then and there wilfully, unlawfully, knowingly and feloniously conspire, confederate and agree together and with divers other persons, to the Grand Jurors aforesaid unknown, to commit the crime of subornation of perjury against the United States, committed as follows; that they, the said George W. Dwinnell, John Gilpin, John D. Gagnon, and Rex F. Deter, the defendants herein, did then and there so conspire, confederate and agree together to unlawfully, wilfully and corruptly suborn, instigate and procure James Frederick French, Benjamin F. French, Frederick M. French, Samuel L. French, Clarence M. Prather, and Arthur W. Jacquette, to commit

the offense of perjury in the State and Northern District of California, by appearing before Clarence W. Leininger, the duly appointed, qualified and acting Register of the United States Land Office at Redding, California, on the thirty-first day of October, in the year of our Lord one thousand nine hundred and six, and respectively take an oath to a sworn statement under the Timber and Stone Lands Acts of the United States, in which sworn statements each of the affiants so named should swear that he 'did not apply to purchase the land described in said sworn statement on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract or in any way or manner with any person or persons whomsoever, by which the title he might acquire from the Government of the United States would inure in whole or in part to the benefit of any person except himself.' Which said sworn statements after being so sworn to before the said Clarence W. Leininger, Register as aforesaid, were to be filed in the said United States Land Office at Redding, California, by each of the persons so subscribing and swearing to the said sworn statement respectively, and which sworn statements so to be sworn to and filed with the Register of the United States Land Office as aforesaid, should be known by each of the said applicants to be false in the material matter therein to be sworn to, in this, that each of the persons at the time of so subscribing and swearing to his respective sworn statement, had an agreement beforehand, and an express understanding that the title he was to secure, and the land he was to apply for in his sworn statement, was for the benefit of the said defendants; and the defendants

and each of them, then and there at the time of so conspiring as aforesaid, well knew that the said sworn statements aforesaid, so to be filed, would be wilfully false in the said material matter just before stated."

It will be observed that the charge says that the applicants were to "take an oath to a sworn statement under the Timber and Stone Lands Acts" and that he should swear that "he did not apply to purchase the land described in said sworn statement" and "which sworn statement after being so sworn to before the said Clarence W. Leininger, Register as aforesaid," "and which said sworn statements so to be sworn to * * * should be known to be false," etc. There are also two or three other references to sworn statements, but nowhere is there a description of the lands, a recital of the land district in which they are situated, or in fact anything to show that the Register before whom the oath was taken was the "Register * * * of the land office within the district where the land is situated" as is required by the Statute.

The charging part of the indictment does not state, as it might have done, that the application was for Public Lands in the Redding Land District. It does not even contain a description of the land from which possibly judicial notice of the District in which the lands were situated might be had. It does not state that the sworn statements referred "to lands hereafter described herein." Instead it ends the charge without any reference to the lands or the district in which they are situated.

If, in view of the Statute, the location of the lands is not material, we ask what then is essential?

The balance of the indictment is a recital of overt acts and any reference to the lands or description thereof contained therein can in no way supply the omission in the charge.

In an indictment for conspiracy under Section 5440, R. S., the conspiracy must be sufficiently charged; and it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

> United States vs. Britton, 108 U. S. 199;
> United States vs. Pettibone, 148 U. S. 197.

No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by implication.

> United States vs. Hess, 8 Sup. Ct. Rep. 573;
> United States vs. Brace, 149 U. S. 870.

In Hayes vs. United States, 101 Fed. 819, the Circuit Court of Appeals declared invalid an indictment lacking the very elements pointed out here. The Court said:

> "The first count in that indictment fails to describe any of the acts which constituted the conspiracy. *It does not charge what lands Gifford was prevented from entering, nor that they were public lands.* This count is therefore clearly bad and no conviction thereunder can be sustained."

In the recent case of Conrad vs. United States (conspiracy), 127 Fed., 799, the Circuit Court of Appeals said:

> "To constitute a good indictment it must charge that the conspiracy was to do some act made a crime by the laws of the United States. When the criminality of the conspiracy consists of a crime to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated. * * * It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be sufficiently charged and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

In Evans vs. United States, 153 U. S. 584, the Court said:

> "The indictment must fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. The crime must be charged with precision and certainty and every ingredient of which it is composed must be accurately and clearly alleged."

The indictment is therefore insufficient in that it fails to locate the lands, to state that they are public lands subject to entry or to state that the oath was taken before the Register of the Land District in which the lands are located.

The demurrer thereto should therefore have been sustained.

C. THE INDICTMENT WAS FATALLY DEFECTIVE IN THAT IT FAILED TO ALLEGE THAT THE DEFENDANTS KNEW THAT THE APPLICANTS KNEW THAT THE

OATH THAT THEY TOOK WAS FALSE. (Trans., p. 17.)

It should be premised that though solicitation to commit perjury was indictable at common law, it is not so made by statute and is not an offense against the United States.

That, therefore, unless and until the applicants actually commit perjury, no crime of subornation of perjury is committed.

THEREFORE, it is essential to the guilt of the defendants that the applicants should know that they are about to swear falsely, and when swearing, that they are swearing falsely and that the defendants must know that the oath is false, and further that the defendants must know that the applicants know that they are about to swear, and when they do swear that they are swearing falsely, or the crime of subornation of perjury is not committed.

In brief, it is not enough that the applicants knew and that the defendants knew the falsity of the oath.

The defendants must know that the applicants knew the falsity of the oath.

There is no allegation from the beginning to the end of the statement that the defendants knew that the applicants knew the falsity of the oath therein alleged to have been taken. It is submitted that the indictment is fatally defective in this respect.

United States vs. Evans, 19 Fed. 912;
People vs. Ross, 103 Cal. 425;
Commonwealth vs. Douglass, 46 Mass. 244;
United States vs. Dennee, 3 Woods, 39.

We call particular attention to the case of United States vs. Evans, *supra,* in which the trial judge in the case at bar participated for the defendant, and in which it is stated: "To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false but does so wilfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knows them to be false, for unless the witness has that knowledge the intent to swear falsely is wanting and he commits no perjury."

The above case was cited with approval and followed in People vs. Ross, *supra,* in an opinion written by Judge Van Fleet, and the above quotation from the Evans case was made a part of the opinion.

There is no allegation in the indictment in the case at bar that the defendants knew that the applicants knew that the oath they took was false. It may be said that this might be *inferred* from that part of the indictment charging the making of a contract on the part of the applicants to the effect that the title which was to be acquired was to be transferred to the defendants. Such inference, however, cannot be drawn from the language of the indictment, for the indictment does not state that the contract was made with the defendants at all. It merely states, "that each of the persons so swearing had an agreement * * * that the title he was to secure was for the benefit of the defendants."

It was possible for the applicants to have made a contract with John Doe for the benefit of the defendants and in the making of such contracts the defendants would have no knowledge of the intention or state of mind of the applicant. The indictment charges that the applicants knew that the affidavit which they were to make would be false, and it also charges that the defendants knew that the affidavit was false, but nowhere does it charge that the defendants knew that the applicants knew that the oath they were to make would be false, save except as it might be inferred from the other language in the indictment, and the above argument shows that there is no language in the indictment from which such an inference can be drawn.

This was the point in the case of People vs. Ross, *supra,* where a will was contested by the widow of deceased, and it was claimed that subornation of perjury was committed by one Ross in the interest of said widow, Isabella McKenney by name, but whose maiden name was Ida Maud Nicholaus. The indictment charged: "That the defendant Ross, in the interest of said contestant and for the purpose and end of having her declared and adjudged the widow of said deceased, and entitled to share in his estate, procured one Ida Maud Nicholaus to appear as a witness at the trial and falsely swear on behalf of said contestant, Isabella McKenney, that she, the said Ida Maud Nicholaus, was married to the said Joseph McKenney in his lifetime, and was then at the time of said trial the widow of said deceased."

The indictment had previously alleged that Isabella

McKenney was the contestant and this allegation was followed by the language quoted above to the effect that said Ross, in the interest for said contestant and for the purpose of having her decreed the widow, procured the said Ida Maud Nicholaus to swear that she was married to the said Joseph McKenney in his lifetime and was then and at the time of said trial the widow of the said deceased. The Court held that any evidence regarding the oath taken by said Ida Maud Nicholaus would be immaterial, as the indictment failed to allege that she and Isabella McKenney were one and the same person. Without any great stretch of imagination it could have been inferred from the language employed that they were one and the same person, but following the well settled rule that the charge in the indictment must be stated specifically and clearly and that the same may not depend upon inference or argument, the Court held the indictment to be defective.

In the opinion in United States vs. Dennee, *supra,* it is said: "Tested by the authorities both counts of the indictment are bad, first, because they do not aver that the defendants knew that the testimony which they instigated the witness to give was false, and second, because there is no averment that the defendants knew that the witness knew that the testimony that she was instigated to give was false."

D. THE INDICTMENT IS FURTHER DEFECTIVE IN THAT PERJURY CANNOT BE PREDICATED ON THE STATEMENT OF A WITNESS THAT A CONTRACT DOES OR

DOES NOT EXIST, OR THAT HE OR ANYONE ELSE HAS OR HAS NOT MADE A CONTRACT OR AGREEMENT IN REGARD TO ANY MATTER.

Whether or not a contract was made, or whether or not there is an existing contract is a mixed question of law and fact, or perhaps, to speak more accurately, it is a question of law on a given or proved state of facts. A layman is not an expert in questions of law, hence it has been held that perjury cannot be predicated on the statement of a layman that he has made or has not made a contract or agreement, or that a contract or agreement does or does not exist even though the statement be shown to be false.

Whether or not such a contract was made, whether or not a contract exists depends upon the opinion of the layman as to the legal effect of certain facts. The layman, if he knows, may testify to the existence or nonexistence of facts, and his testimony, if false, and the other conditions exist, might be perjury, but he cannot be convicted of perjury because he says a certain contract was made or was not made, or exists or does not exist, because it involves matter of opinion. The cases are very clear on this point. See

Commonwealth vs. Bray, 123 Ky. 336;
Schoenfeld vs. State, 56 Tex. Crim. R. 103;
Rex vs. Crespigny, 1 Espinasse, 280.

E. THE INDICTMENT DOES NOT SUFFICIENTLY ALLEGE OR DESCRIBE A CERTAIN AGREEMENT OR UNDERSTANDING, ON THE EXISTENCE OF WHICH ALONE

THE FALSITY OF THE OATH THAT THE DEFENDANTS ARE CHARGED OF SUBORNING DEPENDS.

In the indictment the defendants are told little more than the name of the offense charged against them.

They are told that they are accused of forming a conspiracy to suborn certain persons, named therein, to commit perjury by taking a certain oath therein set forth.

And it is alleged that the said oath was false in this, that each of the said persons so swearing had an agreement beforehand and an express understanding that the title he was to secure and the land he was to apply for in his sworn statement, was for the benefit of the said defendants.

The indictment does not state what that contract was which was to have this effect.

The contract is not set out.

Its terms are not stated.

Nor is its substance stated.

The defendants are vaguely informed that each of the said persons (applicants) had an agreement beforehand and an express understanding that the title he was to secure from the United States and the land he was to apply for in his sworn statement was for the benefit of the said defendants.

In no civil action could such an allegation be sustained.

But a man about to be tried for his life, or what is quite as important to many, for a crime involving personal disgrace and an infamous punishment, ought to

be apprised of the substance, at least, of that agreement or understanding that the Government proposes to prove against him as the basis of a charge as grave as that in this case.

It cannot be said that the Government did not know what the contract (if any) was.

The Government certainly did know what its *theory* of the alleged contract was, and the Government had called before it, as witnesses, five or six applicants or entrymen whose oaths are charged to have been suborned.

The rule that in an indictment an offense must be charged in the language of the Statute, cannot be invoked here, because the making of a contract by which the title that the applicant might acquire from the United States should inure to the benefit of another than the applicant, is not the offense charged in the indictment nor is it an offense against the United States at all, as it is not made so by act of Congress and there are no common law offenses against the United States.

It is unnecessary to recite or reiterate in this connection the offense that is charged against the defendants, but it is proper to add that this agreement or understanding, if capable of being proved by the Government, was capable of being plainly and specifically shown by the proper allegations had the Government chosen to do so. If that contract or understanding was as uncertain, as vague, as nebulous as the allusions to it made in the indictment, it could hardly be the proper basis of so grave a charge as that of which the defendants are accused, or of any criminal charge.

It cannot be said that the defendants did themselves know what the contract (if any) was.

From the earliest times defendants in criminal proceedings have been regarded as innocent until they are proved to be guilty, and if it were otherwise no innocent man could be safe. In the Courts of the United States every man charged with a crime is entitled to be regarded as innocent, not only until after verdict, but until after the taking of the last lawful step in his defense.

The defendants are not presumed to know what this contract was, and if they were innocent they could not know what it was. It is therefore of the greatest importance to them and to the administration of justice in criminal courts that a contract which, although not the crime charged, is the basis of that crime, made so in the indictment drawn by the Government, should be clearly set out so that the defendant may know what that contract is that the Government purposes to prove against him, before it can prove the falsity of an oath that such contract does not exist.

The defendants are entitled to know not only what is likely to be the verdict and judgment against them, if they cannot prove themselves innocent, but they are entitled also to know the facts constituting the crime, and in this case the essential elements of the contract upon which their guilt or innocence depends.

The real question in this case at bar is: Whether the defendants conspired to suborn perjury or whether other parties conspired to extort money from the defendants. The manner in which the indictment was

framed and in which the trial was conducted, made the other parties judges of fact and law as to whether there was an agreement or understanding at the time when they took their oaths or prior thereto.

The indictment departed from the Timber and Stone Act to the disadvantage of the defendants in this: That Act provides in brief that an applicant to purchase must make affidavit that he has no agreement or contract whereby the title he may acquire from the United States shall inure to the benefit of anybody except himself.

The thing prohibited is an agreement or contract. To the minds of laymen an "understanding" is less than an agreement or contract. It is less binding and is more easily entered into.

It is submitted that as a matter of law, an understanding may exist where there is no agreement or contract.

The jurymen were in effect informed by the indictment that the applicants had, beforehand, an agreement or an express understanding that the title they were to secure and the land they were to apply for in their sworn statements were for the benefit of the said defendants.

No one can say how much latitude that word "express understanding" gave the jury, but it is clear and certain that where the Statute and the affidavit both deal with the subject of an agreement or a contract, the indictment should have confined itself to an agreement or a contract and that the defendants must have been, in the minds of the jury, convicted of having entered into an understanding without their being at all convinced of there being any agreement or contract whatever.

It is submitted that an indictment is fatally defective which introduces into the problem an element not contained either in the Statute or in the oath taken before the Register; that the introduction of the words "express understanding" presents an issue not within the purview of the Statute, an issue in regard to which the jury received no instruction whatever from the Court, and the effect of which on the minds of the jury is absolutely incapable of measurement, and the indictment is FATALLY DEFECTIVE IN THIS REGARD.

Our second assignment of error is:

II.

THE COURT ERRED IN REFUSING TO ADVISE THE JURY TO RETURN A VERDICT OF NOT GUILTY.

(Trans., p. 42; assignments of error 5 and 6.)

A. THERE WAS A FATAL VARIANCE BETWEEN THE INDICTMENT AND THE EVIDENCE.

Upon deciding the demurrer the Court filed an opinion which became the law of the case upon which the defendants had a right to rely during the trial thereof.

Morrow vs. Hatfield, 25 Tenn. 108,

where the Court and the parties at an early stage of the proceedings acted on a supposed state of the law, which should exclude certain depositions, and it was held that the subsequent reception of such testimony justified a new trial. See also

People vs. Ward, 145 Cal. 736.

It must be borne in mind that there was no appeal from the order overruling the demurrer and that the defendants were without remedy to change the ruling thereon. In overruling the Demurrer the Court, in its opinion, said that the Government in the proof of its case would be confined to very narrow limits; that the indictment was so framed that evidence tending to show an agreement to transfer the title would alone be permitted. The defendants relied on this construction of the indictment and did not prepare to defend the case on any other ground. They knew that the Government's witnesses had testified before the Grand Jury that the alleged agreement was one by which no title would be acquired from the Government and so, on the trial, relying on the decision of the Court as to the scope of the indictment and the proof which might be offered thereunder, they rested content when they had shown by the Government's own witnesses that the pretended agreement was one for a relinquishment rather than one whereby the title to the land should be transferred to the defendants; and nowhere during the trial was there any indication on the part of the Court or any warning to the defendants that the law of this case had in any way been changed, and at no time were they apprised of the fact that the Court had changed its opinion and position as to the law of the case until the refusal to give the request above referred to.

During the trial of a case the trial Judge is the supreme and absolute arbiter of all questions of law that arise. The defendants relied on the aforesaid declaration of the Court in the said opinion and in this they

were well within their rights, for if such is not the law how can we hope for an orderly procedure in the conduct of any criminal trial. Take the case at bar. The Court said the only evidence which is material to the issues in the indictment is that pertaining to an agreement or contract to transfer the title after entry. The defendants knew that the only evidence necessary to meet such testimony was that of the Government's witnesses themselves, for had they not already testified before the Grand Jury that the agreement was one for relinquishment, and was not this the ultimate overt act set forth in the indictment? Were the defendants bound, on their peril, to bring witnesses from Wisconsin, from Portland and the northern part of this State, at great expense, for the purpose of meeting an issue which the Court had said was not in the case, and if they were bound to produce these witnesses to meet such issues, then would it not be necessary for them to call to the stand witness after witness and interrogate them not only on the question which the Court, in its decision of the demurrer, has said was not at issue, but ask from every witness every question which the Court in its rulings on the evidence had held immaterial, fearing always that the Court might change its mind. The answer to this may be that it was incumbent upon the defendants to prepare for every issue and to offer evidence thereon and that if the Court ruled that such evidence was immaterial under the indictment, that the offer of further evidence was not necessary. But in answer to this we ask whether a ruling on a question of evidence is of any more binding effect than a carefully

considered decision based upon a written opinion? And if the Court can change its attitude between the time of deciding a demurrer and the charge to the jury, why can it not change its mind between the time of rejecting evidence and the submission of the case to the jury. For illustration, suppose that during the trial of a criminal case evidence is offered to rebut the case of the Government and that the same is rejected by the Court on the ground that the State's evidence in that respect does not tend to constitute an offense; suppose that after the evidence is all in, the Court holds that the evidence of the State was material and for that reason the motion for a verdict by the defendant is denied. Would not such conduct be a most righteous ground for a new trial? If not, what security can a defendant have as to the issue he is required to meet? And yet how much more prejudicial was the departure of the Court from its decision upon demurrer in the case at bar! For what is the purpose of a demurrer except to determine the law of the case and to define the issues stated in the indictment. While the authorities are not numerous on this point, yet the reason therefor is that the proposition is so axiomatic that there can be no difference of opinion in regard thereto.

Now the Court held in deciding the demurrer that "the indictment lies within very narrow limits." That the indictment did not charge that defendants conspired to defraud the United States by procuring the making of dummy or temporary entries for the purpose of obstructing the entry of such land by *bona fide* applicants, nor did it charge that the defendants entered into a con-

spiracy to suborn persons making such dummy applications to commit perjury in swearing to that part of their respective applications, which recited that the applicant does not apply to purchase the land "on speculation, but in good faith to appropriate it to his own exclusive use and benefit." (Trans., p. 21.)

But the conspiracy charged was that both defendants conspired to induce the persons to commit perjury in swearing that they had made no agreement directly or indirectly BY WHICH THE TITLE THEY MIGHT ACQUIRE from the Government should inure in whole or in part to any other person or persons than the applicant. (Trans., p. 22.)

Now with this construction of the indictment before us, we challenge the Government to point out a single scintilla of evidence tending to show such a conspiracy.

On the other hand the testimony of the Government's own witnesses shows that the alleged agreement or conspiracy was of an essentially different character, viz., that it was one by which NO TITLE WAS EVER TO BE ACQUIRED AND THEREFORE WAS NEVER TO INURE TO THE BENFIT OF ANY OTHER PERSON.

Frederick M. French was the star witness for the Government, and upon his testimony the case hinges. He was the father of the other three Frenches and the one with whom, it is claimed, practically all negotiations were had. Here is his testimony:

> "Q. Now, Mr. French, at the time of your swearing to that paper (referring to this affidavit he made in the Land Office), did you have any agreement with Dr. Dwinnell or any other of the

defendants in regard to the price that you were to get for that application?"

"Q. Did you have any agreement or understanding with any of the defendants?"

"A. I HAD AN UNDERSTANDING THAT I WAS TO GET TWO HUNDRED DOLLARS IF I WOULD RELINQUISH THE TIMBER."

The witness further stated that the understanding was about the time or a little before the filing and states that Dr. Dwinnell said to him, " 'if you take a claim and relinquish to me it does not bar your timber rights in the least. You can go ahead and make your timber filing just the same' * * * that was about the time I went up there to cruise the timber, between that and the time we went to Redding to make the filing." (Trans., p. 66.)

MR. BLACK: "Q. At the time you made that affidavit, did you know that you had this agreement or contract or understanding with Dr. Dwinnell that you were to make a relinquishment to him for two hundred dollars?"

"A. Yes, sir." (Trans., p. 68.)

"Q. What was said and which boy was it?"

"A. I can tell you what he said to one of the boys, to Sam."

"Q. What did he say?"

"A. Sam asked him in particular—he sent out for the boy and the boy came in to see him. Says he, 'Have I a right to take this timber and relinquish it to you?' Dr. Dwinnell says, 'Yes, you have a perfect right to do it'." (Trans., p. 81.)

James French, another Government witness, testified in relation to the contract as follows:

THE COURT: "I think the objection is well taken and in addition to that I have not heard the witness testify to any such as that either. I suppose it is very easy to find out from him before he made that application whether he had any talk with Dr. Dwinnell as to what he was to do with the land if he got it."

"A. Yes, sir."

THE COURT: "What was the conversation?"

"A. I WAS TO RELINQUISH THE LAND TO DR. DWINNELL." (Trans., p. 112.)

Upon cross examination he testified:

"Q. You have testified to the only contract, to all the contracts or statements that you made to Dr. Dwinnell, at any rate you testified to all there was?"

"A. Yes, I think so." (Trans., p. 115.)

Samuel L. French, another son and Government witness, had no conversation with any party as to any arrangement or understanding about the lands. He testified to the contents of a destroyed letter which he says was addressed to "French Brothers" (a very peculiar way to address three country boys not engaged in business, upon a subject jeopardizing the liberty of the writer), signed by Dr. Dwinnell. Asked as to the contents thereof, he said:

"Q. What did the letter say?"

"A. Well, sir, he wanted us to take the timber and to relinquish it to him and he would give us two hundred dollars. And he told us we would have a right back."

"Q. Now, after receiving that letter, at any time did you have any conversation with Dr. Dwinnell?"

"A. No, sir." (Trans., p. 116.)

Asked what was in the letter relating to the timber, he states:

"A. He wanted us to go and take this timber and relinquish it." (Trans., p. 122.)

Benjamin F. French, another son and witness for the Government, had no conversation with any one relating to any contract or understanding about the lands. He testified regarding the lost letter as follows:

"Q. What did that letter contain?"

"A. It was to the effect that if we wanted to go and file on these lands and hold them until this land was thrown open so that it could be scripped, we were to realize two hundred dollars out of it."

"Q. Are you able now to state positively the contents of that letter?"

"A. No, sir, I am not." (Trans., p. 124.)

"Q. The letter is the only communication that you had personally?"

"A. Yes, sir." (Trans., p. 127.)

THE COURT: "Proceed with the witness and find out what he knows about it."

"A. Yes, sir, that was my understanding that I was to realize two hundred dollars for relinquishment of this land." (Trans., p. 135.)

Clarence M. Prather, another Government witness, says there was never any agreement either to relinquish or to transfer title, in fact, that there was no agreement of any character. (Trans., pp. 105-106.)

Arthur Jacquette, the last of the Government's witnesses, stated that he had no transaction with defendant Dwinnell until "the time of the relinquishment." (Trans., p. 151.)

Such then, was the testimony as to the pretended agreement or conspiracy. Was it an agreement to transfer the title which might inure in the applicants? Most clearly not, but rather an arrangement BY WHICH NO TITLE WAS EVER TO BE ACQUIRED FROM THE GOVERNMENT BY THE DEFENDANTS OR BY ANY ONE ELSE.

Why, then, were the defendants not secure in not presenting any testimony going to the merits of the case. The Court had already told them that the agreement stated in the indictment which was essential to sustain the charge therein contained was one by which the title which came from the Government was to be transferred to another. There had been an utter failure to prove the charge of the indictment and the defendants could well have rested their case without the introduction of any evidence whatever.

The above argument is based upon the propostion that the Court could not vary its construction of the indictments so as to extend the scope thereof at any time during the trial without giving defendants due notice thereof and ample time to prepare a defense thereto. In the case at bar there was no intimation on the part of the Court that a different view of the character of the indictment was held until the request was made for a verdict for defendants.

There was, therefore, no evidence whatever from

any source, that a single one of these entrymen ever made any contract or agreement, or had any understanding with any person that they would acquire title to land and that such title so acquired should be for the benefit of defendants or any other person. Neither is there any evidence that defendants ever conspired together to get these lands for their benefit or for the benefit of either one of them. And it must be kept in mind that the conspiracy charged was to procure the entrymen to commit perjury in the particular matter charged in the indictment. That is, as we have heretofore shown, that the entrymen committed perjury in swearing that they had "no contract directly or indirectly, nor any understanding whereby the title they were to secure from the Government would inure in whole or in part to any other person or persons except themselves." Whereas it is charged they did at the time have a contract and an express understanding that the land they would acquire from the Government should be for the benefit of defendants.

The trial Court must have realized that there was no evidence to warrant a conviction. The opinion of the learned Judge in passing upon the demurrer indicated what the Government must produce in the way of evidence. It pointed out to the defendants clearly what character of proof they must meet in making their defense and these defendants had a right to rely upon such opinion as the law of the case, and to guide themselves accordingly and they had a right to expect that unless the necessary proof was furnished that the jury would be advised to return a verdict of acquittal. (People vs. Ward, 145 Cal. 736.)

In charging the jury, the Court said: "Unless the evidence in this case is sufficient to convince the jurors to a moral certainty, that is, beyond all reasonable doubt, that the conspiracy was actually entered into by the defendants or two of them, or by one of the defendants and some other person, to instigate or procure the four Frenches, Jacquette and Prather, or some of them to appear at the Land Office in Redding, and falsely and corruptly make oath that they respectively had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire from the Government should inure in whole or in part to the benefit of any person except himself, the defendants must be acquitted." (Trans., p. 251.)

This was a clean, explicit statement of the law, too clear to be misunderstood, and it must have been perfectly apparent to the Court that a conviction under the evidence given was unjustifiable, because there was no evidence in proof of the particular crime charged in the indictment. "To justify a conviction one must not only be proven to have committed an offense, but the very offense charged in the indictment."

People vs. Fagan, 98 Cal. 230.

B. THERE WAS NO EVIDENCE OF CONSPIRACY.

In the presentation of the evidence thus far we have referred only to the testimony offered by the Government, but in so doing we would not have the Court understand for a moment that we admit that a conspiracy of any character existed or that the defendants were

without ample evidence to fully rebut every particle of testimony tending to establish a conspiracy. We could, of course, refer to the fact that there was absolutely no motive for Defendant Dwinnell resorting to the method claimed in order to acquire these lands, for it was not necessary to first apply for these lands under the Timber and Stone Act before placing State Lieu scrip thereon. He could have taken his scrip and placed it in the hands of the first person in line at the land office and could have taken all the land in question with the same scrip subsequently used. Why, then, should he resort to the alleged subterfuge and place his liberty in the hands of men so unprincipled as to threaten his life merely because he had made a mistake in advising them as to their rights under the Timber and Stone Act after relinquishing their claim to the land?

An examination of the record will show that the evidence of the Frenches should be entirely disregarded, and when this is done nothing remains of the case except certain suspicious circumstances, every one of which could and would have been explained had it not been for defendants' reliance upon the utter failure of the Government to establish the case which the trial Court said was stated in the indictment.

But even upon all the testimony offered there was no evidence of conspiracy and no proof of any concert of action between the defendants to carry out any design or scheme of any kind, and ESPECIALLY TO GET THE ENTRYMEN TO TAKE UP THE LAND THEY FILED UPON and turn such title over to defendants.

It is alleged in the indictment that the defendants "did conspire, confederate and agree together to unlawfully, wilfully and corruptly suborn, instigate and procure James Frederick French, Samuel L. French, Clarence M. Prather and Arthur W. Jacquette to commit the offense of perjury."

To sustain this charge, there must be testimony showing some agreement, understanding or joint action tending to bring about this result, viz.: perjury as to the particular matter set forth in the indictment.

The four Frenches do not give us any word of testimony showing anything of the kind. Their testimony related entirely to Dr. Dwinnell. Frederick M. French and James Frederick French were, as we have shown, the only witnesses who pretend to have talked with anyone about taking up the land. The others of the French family had no conversation whatever with any one, but confined their testimony to the contents of the lost letter.

Clarence M. Prather denied having any understanding or agreement with any of these defendants regarding any land. He stated:

> "Q. Before you made this location, did you ever have any understanding, any agreement of any kind whatever whereby your title should go to the benefit of Dr. Dwinnell?"
>
> "A. I did not."
>
> "Q. Or any of the defendants?"
>
> "A. No, of no one, no." * * *
>
> "Q. Did you agree or have any understanding of any kind at all at the time you made your location that you should relinquish it to the Government?"
>
> "A. No, sir." (Trans., pp. 104-5.)

Arthur Jacquette testified: Was at the mill of the Wetzel Lumber Company and Gilpin came to me and asked me if I wanted to make two hundred dollars. I told him I did and he told me if I would go out and stop or squat on a certain piece of land there for a term of two weeks, build a cabin and put up some improvements, that that amount would be paid me. * * * (Trans., p. 143.) A few days after I met Mr. Gilpin at the same place and he took me out and showed me this land and posted notices on it that I intended to take that land as a homestead and was stopping there. A short time after I went back up there, and with the help of Charles H. Freyer and Frank Ritchie, put up a cabin on that land. I helped them to build theirs and they helped me to build mine. * * * Later about a week or such a matter later, I went out there and stayed one night. I had a camp outfit sent to me. * * * The next transaction was about the 10th of September. I met Mr. Dwinnell as I was going into Montague coming out in a buggy. He handed me an affidavit in an envelope addressed to the Land Office at Redding. * * * I went before G. H. Chambers, the Notary at Montague, made affidavit to it and mailed it to Redding. * * *

I was next in Montague and Frank Ritchie told me we would go down there in a few days. I was driving a team for Wetzel at the time. I went in there and there I met Mr. Gilpin. He gave me the money to buy two tickets as far as Dunsmuir and from there I bought my own ticket into Redding. (Trans., pp. 144-5.)

Witness then details about going to the hotel at Redding. Says Deter made out paper for him, witness giving the description. * * *

Witness then details how Gilpin came to him, took his papers out and brought him back a homestead affidavit and gave him $20, telling him if others were ahead of him to file his homestead claim, saying that the homestead had the preference. (Trans., p. 149.)

"Q. Did you have any dealings with Dr. G. W. Dwinnell in reference to getting your relinquishment for that land?"

"A. I had no transaction with him until time of the relinquishment."

"Q. What occurred then?"

"A. We were in Gagnon's saloon and Dwinnell said to me, 'Now if you are ready, we will go down and fix up that business'."

"Q. Go on and tell what occurred then."

"A. We went down to his office. I believe Gagnon went with us. When we got down there they gave me $180. Gagnon's check for $180 and then we went back to the saloon, Gagnon and I, and he gave me $20 in currency for my relinquishment."

"Q. Who gave it to you?"

"A. Gagnon gave it to me, $20. The $180 check Gagnon wrote out or Dwinnell picked it up and handed it to me and said, 'I believe that is what you expected to get.' I told him it was." (Trans., p. 151.)

Upon cross-examination he testified.

"Q. DID YOU HAVE A SINGLE WORD WITH DR. DWINNELL OR WITH ANY OF

THESE DEFENDANTS WITH REFERENCE TO THIS AFFIDAVIT BEFORE YOU MADE IT, YES OR NOT?"

"A. NO SIR."

"Q. Did Dr. Dwinnell tell you, or did any one of these defendants tell you to make a single false statement before the Land Office at Redding, California? Yes or no? You said you had not a word with them. Now bear that in mind answering this question if you will."

"A. I did not." (Trans., p. 153.)

The witness further stated that he had a talk with Gilpin in his place of business.

"Q. What talk did you have, Mr. Jacquette?"

"A. I told him that I did not like that transaction, that it looked like straight perjury. He told me that if I kept my mouth shut it would be all right."

"Q. Yet knowing of this conversation and knowing this would be perjury, you went to the Land Office and made the affidavit?"

"A. I did." * * *

"Q. As a matter of fact, have you ever made a conveyance of this land to any of these defendants?"

"A. Only a relinquishment. * * * I relinquished to the Government." * * *

"Q. It was about a month after you had made your location or thereabouts?"

"A. Yes sir." (Trans., p. 154.)

"Q. As a matter of fact, Mr. Jacquette, did you not agree to pay Mr. Gilpin a certain amount for locating you on this land, yes or no?"

"A. Well yes."

"Q. How much did you agree to pay him?"

"A. In case the land became mine, and I got a title to it, I was to pay him, Gilpin, $150. It was a verbal contract between the two of us there." (Trans., p. 155.)

There was absolutely no evidence of a conspiracy among the defendants, or any of them, and nothing whatever to show or indicate a previous agreement among the defendants to procure anybody to do anything.

The evidence utterly fails to show any conspiracy, or even any individual intent, on the part of any of the defendants to procure any of the applicants to swear falsely, or that they had any agreement whereby the title they might acquire would inure to the benefit of any of the defendants.

The only thing the evidence tends to show is that the applicants intended *to relinquish their filings* and not to acquire any title for themselves or any other person, and such evidence did not even tend to prove the charge in the indictment.

In order that the conspiracy may exist, this at least is necessary; that the minds of the parties meet on the same thing and in the same sense in an agreement at some future time to do that thing.

In the case at bar the thing in question must be the crime and offense against the United States.

Unless the above union of minds existed at one and the same time, and prior to the taking of the oaths by the applicants, there was no conspiracy.

Until the formation of a conspiracy, no overt act

done by any person can avail anything nor are the parties indictable as co-conspirators.

An overt act is no evidence of a conspiracy.

An overt act only marks the end of a period during which a conspiracy already formed may be abandoned by one of the conspirators or by all.

It is submitted that the evidence in the case at bar, when fairly considered, could not possibly have proved, and it is submitted that it did not prove when the conspiracy (if there was one) was formed, and that there was no evidence sufficient in weight to be submitted to a jury or capable of proving that a conspiracy existed at any time, much less was there evidence of sufficient weight to be submitted to a jury that a conspiracy was formed prior to the thirty-first day of October, 1906, the date the oaths alleged to have been false were taken.

It is submitted that the formation and existence of a conspiracy before the thirty-first day of October aforesaid, was not shown and that the evidence (if evidence it was) in Court was not sufficient in weight to be submitted to a jury and that the motion of the defendants at the close of the evidence to direct a verdict for the defendants should have been granted.

INSUFFICIENCY OF EVIDENCE.

The indictment as construed by the Court, Hon. J. J. De Haven, charges the crime of conspiracy to commit the crime of subornation of perjury, in that each of the persons at the time of the swearing to their statements had an agreement beforehand and an express under-

standing that the title he was to secure was for the benefit of the defendants.

The Court distinctly held in its opinion that the indictment does not charge a conspiracy to defraud the United States by covering the land with *dummy or temporary applications.*

In fact, the overt acts with reference to relinquishments were committed long after the alleged conspiracy had terminated, and hence these relinquishments have no application whatsoever to the facts of the case.

They should not have been admitted in evidence under the Biggs and Williamson cases. The evidence conclusively shows that the scheme, if any, was to cover the land with dummy applications, then relinquish to the Government to enable the defendants to purchase from the Government after the land had been restored to the public domain. This may or may not be a conspiracy to defraud the United States. It is not, however, as pointed out in the Court's opinion, the offense charged in the indictment. The scheme was one of relinquishment *and not the securing of title by the entrymen for the benefit of the defendants.* In fact the entrymen were not to acquire any title whatsoever from the Government. No title was to vest in the entrymen; no title was to pass to the entrymen from the Government.

We insist that the evidence was inadmissible under the Williamson case, 207 U. S. 425, and we further insist that the indictment was not sustained by this proof, and this was the sole proof offered by the Government in support of the indictment. And we also insist that

the doing of these things constituted no crime. Our contention in this respect is borne out by the recent case of the United States vs. Biggs, 157 Fed. 271, which case was afterwards affirmed by the Supreme Court of the United States in volume 29 of the United States Supreme Court Reporter 181, the Court said:

> "The Statute does not cover the transaction, and however represensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the Statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly."

And in the same case the Court further says:

> "But it is said the indictment charges a violation of Section 1 of the Act in the acquisition of more land by the corporation than there limited. When it comes to that, the indictment does not charge that the several entrymen were disqualified as such, nor that when they made application they had outstanding contracts to sell, or when then acting under agreements or hire for said defendants or said corporation."

Our third assignment of error is

III.

A. THE COURT COMMITTED ERROR IN REFUSING TO GIVE THE INSTRUCTION REQUESTED BY DEFENDANTS AS FOLLOWS: "If the jury are satisfied from the evidence " that the defendants have established a good character

" for truth, honesty, and integrity, then such good " character of itself may be sufficient to raise a doubt " as to the defendants' guilt." (Assignment of Errors No. 3, Instruction No. 37, Trans., p. 41.)

People vs. Doggett, 62 Cal. 27;
People vs. Bell, 49 Cal. 489;
People vs. Ashe, 44 Cal. 291.

The error was most remarkable and probably a controlling one on the minds of the jury.

In 1896 the United States Supreme Court in reversing a judgment and giving defendant a new trial said that evidence of good character should be considered by the jury, and the Court quoted with approval from an Illinois case to the effect that such evidence is entitled to much weight and that it might have given the prisoner an acquittal.

Edgington vs. United States, 164 U. S. 361, 367.

This is substantially equivalent to the instruction asked for and refused in the case at bar, and it is in marked contrast to the instruction actually given by the trial judge.

FIRST: The trial judge said in the instructions given: "It (evidence of good character) is to be con- " sidered by you in connection with the other facts in " the case, and given such weight as you think it en- " titled to." (See Trans. of Record, p. 262.)

The United States Supreme Court, quoting further from the Illinois case, said, such evidence should be given much weight.

The clause "such weight as you think it entitled to",

left the jury free to give that evidence very slight weight or no weight at all. Such was not the view taken by the Supreme Court.

Evidence of good character was entitled to "much " weight."

Second: The trial judge concluded his instruction on this point by leaving in the minds of the jury a last impression to the effect that irrespective of the evidence of good character, they might find the defendant guilty.

The United States Supreme Court concluded its statement by saying (in the extract above mentioned, included in its opinion and made a part of it), that the evidence of good character under proper instructions (instead of improper) might have given the defendant an acquittal.

The similarity between instructions asked for and refused in the case at bar and the doctrine laid down by the Supreme Court is very marked and the difference in substance and in spirit between the doctrine taught by the Supreme Court and that of the instruction given in the case at bar, is most striking.

Further, the United States Supreme Court in the above case says specifically: "The decided weight of " authority now is, that good character, when consid- " ered with other evidence in the case, may generate " a reasonable doubt."

Edgington vs. United States, *supra,* p. 366.

Again, the Supreme Court say: "The circumstances " may be such that an established reputation for good " character would alone create a reasonable doubt."

Edgington vs. United States, *supra,* p. 366.

Finally, the Supreme Court says that "evidence of "good character is admissible, not only to give weight "to a defendant's testimony, but to establish a gen- "eral character inconsistent with guilt of the crime "charged."

Also in the Circuit Court of Appeals in 1899, following the Edgington case, held that evidence of good character of the accused may itself produce in the minds of the jury a reasonable doubt.

Rowe vs. United States, 97 Fed. 779.

As early as 1868 Chief Justice Cooley said: "In- "struction is often given that proof of good character "is not to be allowed to weigh against evidence which "is itself satisfactory" * * * "such instructions "are well calculated to mislead" * * * "good "character may not only raise a doubt of guilt, which "would not otherwise exist, but it may bring convic- "tion of innocence."

The People vs. Garbutt, 17 Mich. 25, 26.

The digest item in the syllabus of the above case does not adequately represent the effect of the opinion of the eminent judge. The opinion itself must be consulted.

As late as 1894 the Supreme Court of Michigan held the following charge of the trial judge erroneous:

"Good character is always admissible in criminal cases and must be always received by you, but

it is for you to say whether it will have any weight with you in coming to your verdict or not."

The Supreme Court said: "The charge is erro-" neous because it disassociates evidence of good char-" acter from the other testimony."

(Remark) In the opinion of the Supréme Court the judge's charge is reproduced to the extent of nearly a page; it cannot be summarized, but it is believed that the above fairly represents it.

The People vs. Laird, 102 Mich. 141.

In 1879 the Supreme Court of Pennsylvania held that evidence of good character is not a mere make-weight thrown in to assist in the production of a result that would happen at all events, but it is positive evidence and may of itself by the creation of a reasonable doubt produce an acquittal.

Haine vs. Commonwealth, 91 Pa. St. 125, 148.

In 1908 the Supreme Court of Pennsylvania held that a charge that "where the jury is satisfied beyond " a reasonable doubt of the defendant's guilt under all " the evidence, the evidence of previous good char-" acter is not to overcome the conclusion which fol-" lows from that view of the case", to be confusing to jurors and might lead them to disregard evidence of good character.

For the above reason judgment and verdict of guilty was reversed and new trial granted.

Commonwealth vs. Cate, 220 Pa. St. 138.

In 1870 the New York Court of Appeals specifically held that "evidence of good character is not only "of value in doubtful cases and in prosecutions for "minor offenses but it is entitled to be considered "when the crime alleged is atrocious and also when "the testimony tends very strongly to establish the "guilt of the accused."

"It will sometimes of itself creat a doubt when with- "out it none would exist."

Remsen vs. The People, 43 N. Y. 6, 9.

Early in the present year the Appellate Division of the Supreme Court of New York following the case of Remsen vs. People, *supra,* held that evidence of good character might raise a doubt. The Appellate Division says:

> "The determination of what weight evidence of good character should have must be left to the sound and not the fanciful discretion of the jury."

The Appellate Division says the jury were told by the trial judge in his charge that if there should be some doubt or hesitation in their minds, even if it did not rise to the importance of a reasonable doubt, it was for them to say *then* whether defendants were men of good character. If otherwise there was no doubt in their minds as to the guilt, no hesitation with regard to it, it was still the duty of the jury to consider the evidence of good character of the accused. It might raise a doubt, it might not, it was for them to say.

Viewing the whole charge of the trial judge the Appellate Division says:

"The error in the charge is so serious in view of the sharp conflict of evidence in the case, we feel constrained to reverse, notwithstanding no exception was taken to the charge as made.

People vs. Platt, 136 App. Div. (N. Y. 717, 720).

B. THE COURT ERRED IN REFUSING TO GIVE INSTRUCTION NO. 38 REQUESTED BY DEFENDANTS.

This instruction was as follows:

"The defendants in this case have introduced evidence of their good character for truth, honesty and integrity. If you believe from the evidence that the good character of the defendants for truth, honesty and integrity is proven to your satisfaction, then such fact is to be kept in view by you throughout all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendants, you entertain any reasonable doubt of the defendants' guilt then it is your duty to return a verdict of not guilty." (Trans., p. 42.)

The above request for an instruction is a clear and succinct statement of the rule of evidence as applied to this case.

The verdict in this case, which was one in which both the character of the state's witnesses and one of the defendants was put in issue by the testimony of numerous witnesses must, of necessity, have depended to a large extent on the view the jury took of the truth,

honesty and integrity of the respective parties above mentioned and the weight to be given the evidence of good character.

The defendant had offered evidence of people of established position and standing in the community in which he lived as to his good character for truth, honesty and integrity and it was only proper for the Court, and anything else was improper, to charge that " if after a consideration of all the evidence in the case " including that bearing upon the good character of " the defendants you entertain any reasonable doubt of " defendant's guilt, then it is your duty to return a ver- " dict of not guilty."

Now the Court attempted, in a way, to cover the instruction above requested, but how frailly it was done and with what prejudice, is apparent by the mere reading of the instruction. This was as follows:

> "The defendants have introduced evidence of good character for truth, honesty and integrity. If you believe from the evidence that the good character of the defendants for truth, honesty and integrity is proven to your satisfaction, then such fact is to be kept in view by you throughout all your deliberation, and it is to be considered by you in connection with the other facts in the case, and *given such weight as you think it entitled to.* If, after consideration of *all the evidence* you believe that any defendant is guilty as charged, why, then, it will be your duty to return a verdict of guilty, notwithstanding proof of good character."

This instruction was wrong in the first place in stating that if good character is proven then such fact

is to be kept in view throughout all your deliberations. It was the province of the Court to instruct the jury, as it did, but it should have gone further and told the jury what the effect of such testimony would be in the consideration of the case. But that was not all. In connection and as a part of the charge on this very question the Court stated:

> "If, after consideration *of all the evidence,* you believe that any defendant is guilty as charged, why, then, it will be your duty to return a verdict of guilty notwithstanding proof of good character."

The effect of this charge was this: that if the jury believed that all of the evidence except that of good character was sufficient to convince the jury that the defendant was guilty, then they could absolutely and entirely ignore any evidence and all the evidence of good character. Such is not the law. The evidence of good character was before the jury, to be considered in connection with all the other evidence in the case, and the Court could no more charge the jury to disregard such evidence than it could to charge the jury that if they found that the defendants were of good character, then, that they might disregard all the other evidence in the case.

The charge of the Court was not unlike that given in the case reported early this year in Appellate Division of the Supreme Court of New York. In that case the jury were told by the trial judge that if there should be some doubt or hesitation in their minds, even if it did not rise to the point of a reasonable

doubt, it was for them to say then whether defendants were men of good reputation. If otherwise there was no doubt in their minds as to their guilt, no hesitation with regard to it, it was still the duty of the jury to consider the evidence of good character of the accused. That might raise a doubt and it might not, it was for them to say.

The Appellate Division reviewing this charge said that the determination of what weight evidence of good character should have must be left to the sound and not to the fanciful discretion of the jury. They conclude by saying:

> "Viewing the whole charge of the trial judge, we are of the opinion that the error in the charge is so serious that *in view of the sharp conflict in the case,* we feel constrained to reverse, notwithstanding no exception was taken to the charges made."
>
> People vs. Platt, 136 App. Div. (N. Y. 717, 720).

Our fourth assignment of error is:

IV.

THE COURT ERRED IN OVERRULING THE DEFENDANTS' OBJECTION TO THE QUESTION, "DID YOU EVER HEAR THE DE-"FENDANT DR. DWINNELL'S REPUTA-"TION FOR TRUTH, HONESTY AND IN-"TEGRITY QUESTIONED IN REGARD TO "LAND MATTERS?"

This question was asked by Government's counsel of witness Fairchild on cross-examination, Fairchild

having been a character witness for the defendant Dwinnell. (Trans., p. 192.)

This question was properly objected to and exception taken and an answer was not finally elicited until the Court's attention had been thoroughly called to the error in the question as stated.

It is the principle that though the testimony of an impeaching or supporting witness should be confined to the *reputation* of the person whose character is being attacked or supported, yet when, on cross-examination, he is interrogated as to facts or matters tending to contradict or weaken the result of his direct examination, such cross-examination must be confined to facts and matters within his knowledge and not depend on hearsay.

V.

NINTH ASSIGNMENT OF ERROR.

Ninth. *The Court erred in permitting in evidence the reliquishments.*

The relinquishments by which the entrymen were to relinquish the land back to the Government WERE FILED AFTER THE ALLEGED CONSPIRACY HAD TERMINATED. The relinquishments clearly demonstrated that the entrymen were not to procure title and had not contracted with the defendants to procure title for them. These relinquishments had absolutely nothing to do with the case. Over our persistent objections the papers were admitted in evidence, as well as conversations relating to them.

On page 69 of the transcript the following occurred:

MR. BLACK: "Did you have any conversation with Dr. Dwinnell in regard to obtaining relinquishments from any of your sons?"

MR. SCHLESINGER: "I object to that unless the time is fixed, as time is of all importance in this transaction, *if he had a talk prior to the locations it is perfectly proper.*"

MR. BLACK: "The conversations would be after the 31st day of October and between that and the 1st day of December, 1906."

MR. SCHLESINGER: "That is not sufficient unless it is an agreement made prior to the locations."

MR. BLACK: "I do understand that is the rule." * * *

THE COURT: "The objection will be overruled."

MR. SCHLESINGER: "We take an exception." (See testimony of F. M. French, Trans., p. 69.)

The date of the alleged conspiracy as appearing in the indictment is the 25th of October, 1906. Counsel for the Government insisted on introducing evidence as to relinquishments and again on page 128 relinquishments of entrymen to the Government were introduced over the objections of counsel for the defendant.

So insistent were counsel for the defendant on this point that the following colloquy occurred between Court and counsel.

MR. BLACK: "Q. I will show you a paper that is dated November 26, 1906, and signed D. F. French, witnessed by G. W. Dwinnell, and ask you if you know who filled that out, that is the written part of it."

"A. Yes sir."

MR. SCHLESINGER: "So as not to take up the time with objections let it be understood that all this is subject to our objections."

THE COURT: "One objection is as good as a thousand."

All of those relinquishments bore date after the 25th day of October, 1906, and after the locations were filed, and long after the alleged conspiracy had terminated. Under what conceivable theory the documents were admitted or testimony concerning the same allowed we are unable to understand. If it be claimed that they were admitted to show motive it is incumbent on counsel for the Government to confess error under the most recent United States Supreme Court decisions.

This testimony was objected to (Pages 46, 69, 103, 127, 128, 150, Transcript.)

It was for a similar error committed in the Williamson case, 207 U. S. 425, that the Supreme Court of the United States reversed the judgment. In speaking of this case the Supreme Court in Biggs vs. U. S., 29 Sup. Ct. Rep. 184, said:

"The Williamson case was a prosecution for a conspiracy in violation of Sec. 5440, Rev. Stat. to procure the commission of the crime of subornation of perjury, by causing certain affidavits to be made for the purpose of acquiring land under the timber and stone act. At the trial, over exceptions, affidavits as to the *bona fides* of a number of applicants and of the purpose of each, in making his application to acquire only for himself,

were offered in evidence, and like affidavits which were required by the rules and regulations of the Land Department at the time of the final entry were also offered in evidence. The Government insisted that the papers were admissible because the indictment charged a conspiracy to suborn perjury, not only at the time of the application to purchase, but also in the subsequent stage of making the final entry; and that, even if this were not the case, the affidavits made after application were admissible for the purpose of showing the motive which existed at the time the application was made. It was decided that the indictment only charged subornation of perjury at the time of the application. Passing on the alleged contention as to motive, it was held that, in view of the requirements as to an affidavit exacted by the statute to be made at the time of the application, as to the *bona fides* of the applicant and his intention to buy for himself alone, and the absence of any such requirement in the statute as to the final entry, that the prohibition of the statute applied only to the condition of things existing at the time of the application to purchase, and did not restrict an entryman after said application was made, from agreeing to convey to another, and perfecting his entry for the purpose, after patent, of transferring the land in order to perform his contract. It was, therefore, held that the affidavits made at the final stage of the transaction were not admissible to show motive at the time of the applications to purchase, and that the requirements contained in the rules and regulations of the Land Department making an affidavit essential to show *bona fides,* etc., at the final stage were *ultra vires* and void."

CONCLUSION.

In conclusion, we most earnestly desire the Court to take a general view of this case, which is remarkable in many features; we have presented to this Court what we think substantial error; we have taken no ground that can be said to be strictly technical.

In our judgment the only solution of why a jury hearing the evidence in the cause could find these defendants guilty is because of the excited and inflamed state of the public mind at the time of trial. As is too well known, in this class of cases, an accusation is nearly equivalent to a conviction. Jurors enter the box prejudiced against any and every person who has in any way or manner acquired any public land. They are not familiar with the process by which timber, homestead, mining or oil lands are acquired by the individual. They know nothing of liew scrip, forest reserve scrip, or any other kind of scrip. They are led to believe that any person who has obtained any public land has in some underhanded way taken something from the people; they are the people and they are in the frame of mind to convict, with or without cause, any one who in any way or manner has acquired any public land.

The record in this case illustrates this tendency to convict regardless of the evidence.

In this case defendant, Dwinnell, has been legitimately dealing in timber lands for many years, and was familiar with the method of their acquisition and the placing of state scrip.

This land was thrown open at Redding for entry and there was no preference. It was first come, first served. That was the reason why the people got in line. A man could place state scrip as well as file under the Timber and Stone Act. Dr. Dwinnell knew this, and had he desired this land, he could have stood in line and have placed the very scrip that was afterwards used to take this identical land, or the Frenches could have placed the scrip. The certificate which they would receive under the Statutes of California was assignable and made expressly so, and by so doing they would not have exhausted their rights under the Timber and Stone laws.

How odd that Dwinnell would insist on having these men commit perjury when it was entirely unnecessary and not only that, but pay $200 each for the opportunity and especially when he never got one acre of the land.

This brings us to the point in dispute between Frederick M. French and Dr. Dwinnell as to when the trade was made. French says before filing; Dwinnell says after filing. We submit that in all reason Dr. Dwinnell gave the true statement, because it is incomprehensible that a man of any intelligence would insist on committing an unnecessary crime. The threatening letter written to Dr. Dwinnell not only discloses the character of the witness but the character of the transaction. Here was a man trying to frighten another into giving up money. He does not claim that he was made to commit perjury. Why? Because it was not true. It never entered his head at that time, August 19, 1908,

the date when the letter was written. What he was complaining of was that they could not make another filing after the relinquishment. Never a word about being used as a tool or dummy by Dr. Dwinnell. Never a word about being led to commit a crime.

Singular, indeed, that a jury, when there was a flat contradiction between these two men, should take as conclusive the word of him, a confessed perjurer and blackmailer, and of whom his neighbors, the Justice of the Peace where he lived, the Constable, the District Attorney, the County Assessor, and a dozen reliable and respectable witnesses all said his reputation for truth, honesty and integrity was bad, and that they would not believe him under oath. And especially, when he was testifying against a man whose life he had threatened; and of whom he had remarked that he would be willing to spend the balance of his life in the penitentiary could he see Dwinnell there too. (Trans., p. —.) Singular, that the jury should insist upon believing the statement of the man whose animus, bias, and hatred of Dr. Dwinnell was proved by testimony that could not be contradicted and was not contradicted except by French himself. That they would give preference to the word of him whose character for truth, honesty and integrity had been impeached by a dozen reliable witnesses and in every way known to the law of a witness who was not only flatly contradicted by the evidence of witnesses called by defendant but by his own son, a Government witness. (Trans., pp. —.)

And it is important here to note that this same witness, Frederick M. French, testified to a conversation

had between his son, Samuel Leonard French, and Dr. Dwinnell, giving the details of the conversation which he said took place between Samuel French and Dr. Dwinnell. Samuel French flatly contradicts him. He states:

"Q. Do you know Dr. Dwinnell."
"A. Yes, sir."
"Q. Do you know John Gilpin?"
"A. Yes, sir."
"Q. Deter?"
"A. Yes, sir."
"Q. Do you know Gagnon?"
"A. Yes, sir."
"Q. Before the 31st day of October, 1906, did you have any conversation with any of those people that I have mentioned in regard to taking up a piece of land?"
"A. None, whatever." (Trans., p. 81.)

It is here apparent that in giving his testimony, the father had put into the mouth of his son, created out of whole cloth, a dialogue which he said took place between the son, Samuel L. French, and Dr. Dwinnell at the Doctor's office in Montague. (Trans., p. 81.)

This testimony given by Frederick M. French could be for no other purpose than to bolster up his own testimony to the effect that the trade for the relinquishments was made with them before the filings were made. In this connection we call attention to the fact that the witnesses were put under the rule of Court and excluded from the Court room and not allowed to hear the testimony of other witnesses. (Trans., p. 24.)

In this cause, with the greatest respect for the Courts,

with a full appreciation of their honesty and integrity of purpose, knowing that the constitutional guaranty of a fair trial is the right of each and every citizen, a right which is not only his privilege but his duty to demand, and to resist to the uttermost any attempted encroachments upon that right, we believe the rights of the defendants in this case have been invaded in this respect.

Every defendant, during his trial, is entitled to have his innocence presumed. This is a right, not a mere fancy.

Frederick M. French was the main witness for the prosecution. We may fairly say that the case of the Government practically depended upon his testimony. We most respectfully desire to call the Court's attention to a portion of the cross-examination of this witness:

"Q. Do you know H. H. Hudson of Montague?"

"A. Yes, sir."

"Q. In his store at Montague, did you not tell him you were going down to your house to get your gun to kill Dr. Dwinnell?"

"A. I never told H. H. Hudson such a thing, he or any other man."

"Q. In the summer of 1907, in a team driving from Montague to Butte Creek, with Mr. Lucas present, and Mr. Gilpin, one of the defendants, did you not say to him in that presence, and at that time, that if you ever caught the Doctor in the timber you would kill him like you would a coyote?"

"A. I never said any such thing. Who was with Gilpin?"

"Q. Yourself and Mr. Lucas."

"A. Just Lucas and me. Was Gilpin along?"

"Q. Yes."

"A. I don't think Gilpin has ever spoken to me since this transaction came up, since this bitter feeling between us over this timber matter has existed."

"Q. Did you go out with him to Butte Creek to show him a Forty out there?"

"A. Gilpin?"

"Q. Yes."

"A. Never in God's world. I never went with Gilpin to look at a piece of timber in my life, only in Scott's Valley."

"Q. In Montague, on the bench, in February, 1906, in front of John Gagnon's saloon, did you not say to E. K. Looseley, when the Doctor was passing, 'There goes that son-of-a-bitch; I will put him in the penitentiary even though I had to go there the balance of my life?' "

"A. No, sir; I never told him so."

"Q. You did not make that statement?"

"A. No, sir."

"Q. Or words substantially to that effect?"

"A. No, sir."

"Q. At Montague, on or about September 8, 1907, at the same place, Gagnon's saloon, did you not state to Rex Deter, one of the defendants here, that he, Deter, would have a chance to come up before the United States Court, and tell what he knew about the timber business, and he asked you what timber, and you told him the timber business your boys took up, and you said, 'There goes the Doctor, the old son-of-a-bitch had done us up, and I will see him in the penitentiary if it costs me the rest of my life'; did you say that?"

"A. I never said it."

"Q. You never made any threats against Dr. Dwinnell?"

THE COURT: "I think this has gone far enough. There is no necessity in going all over these minor matters. You have asked him in relation to about a dozen of these expressions."

MR. TAYLOR: "With different parties."

THE COURT: "The witness has stated over and over again, he is not on friendly terms with Dr. Dwinnell. That is sufficient for general purposes to enable the jury to determine whether his testimony is affected by any such feeling. There is no need to go into all these minute matters."

MR. TAYLOR: "Q. I hand the witness what purports to be a letter in his handwriting, signed by himself, written from Sacramento, and directed to Dr. Dwinnell, at Montague." (Handing.)

"A. Yes, sir; that is my handwriting."

"Q. You wrote that letter?"

"A. I wrote that letter if it has not been counterfeited. I would just as soon have it read to the Court and to the jury as not."

"Q. Did you mail that from Sacramento to Dr. Dwinnell?"

"A. Yes, sir; I mailed that from Sacramento to Dr. Dwinnell."

MR. TAYLOR: "I will offer the letter in evidence. (Reading.)

"Sacramento, Aug. 19, 1908.

"G. W. Dwinnell: You wright the rong you did me. You have caused a cloud to arise between my wife and I that will never clear away; as I live with my sons a stranger, and it is caused by you. You told us we could make a second timber filing. You knew you lied at the time, but I had confidence in you, and advise them in you favor, as I

knew nothing of the law at that time. You go to Mrs. French and those boys and fix for every claim, Or I will send some parties there to settle with you.

"F. M. FRENCH."

(The letter is marked Defendant's Exhibit 1.)

"A. Yes, sir; I wrote that, and sent it to him, and I went to Mr.——."

THE COURT: "That is sufficient."

MR. TAYLOR: "That was after you had received——"

THE COURT: "I really do not see the necessity of going into this collateral matter to such an extent. You have got the facts here of the bitter feeling between them, and you have got the statement in writing. Why are you not satisfied with that?"

MR. TAYLOR: "I want to ask the witness a question."

THE COURT: "You cannot try a case that way. The jury will forget all about the case. They will think they are trying some other case."

MR. TAYLOR: "Counsel have some idea of putting in their case."

THE COURT: "I do not think you have the correct idea. If that is your idea of trying the case, it is not mine."

MR. TAYLOR: "Unfortunately I have to attend to my client's case as best I can."

In all these impeaching questions the defendants were in good faith, showing the extreme malice of the witness and laying the foundation for impeaching testimony which was subsequently introduced showing each and every one of French's denials to be false in every particular. Owing to the character of the Gov-

ernment's case, resting as it did on the testimony of a father and three sons, none of whom could have favorably impressed the jury, was it not essential to the ends of justice that their veracity should be determined by the ordinary tests provided by law for that purpose.

Every suggestion of impeaching testimony was in the utmost good faith and every denial of French was fully and squarely met by the persons mentioned.

Witness Hudson testified that French said, "I have "a notion to go out and get my gun and kill John Gag- "non and Dr. Dwinnell. I will be damned if I don't "believe I will go and do it." (Trans., pp. 197-198.)

Witness Looseley testified that in 1907, he had a conversation with French at Montague as Dr. Dwinnell was passing by, and that French said, "There goes "the son-of-a-bitch. I will put him in the penitentiary "even though I have to go there the balance of my "life." (Trans., p. 196.)

Witness Deter testified that at Montague on September 8th, 1907, in conversation with French, French said, referring to Dr. Dwinnell, "There goes the Doc- "tor, the old son-of-a-bitch has done us up, and I will "see him in the penitentiary if it costs me the rest of "my life." (Trans., p. 212.)

The greatest latitude should have been allowed counsel in the cross-examination of the witness, and counsel feel that the characterizing by the court of the testimony as *minor, minute* and *collateral matters* had the same effect upon the jury as though the Court had told them that the evidence amounted to nothing and should be given no weight in its deliberations. The record

shows that counsel had been brief, that the questions were all direct, to the point and proper cross-examination, and were for the purpose of laying the foundation for impeachment of the witness and showing his deadly hatred and desire for revenge against defendant Dwinnell.

Speaking within the record, we may say Dr. Dwinnell has lived in this State for many years, practicing an honorable and ennobling profession, and has attained a standing and reputation among his fellow citizens and neighbors equal to the very best.

It is inconceivable that such a charge should have been made against him, except on the assumption that over active secret service agents presume that everybody dealing in any way with the Government Land Department is guilty of some evil design. In this instance the detectives probably found what to them seemed suspicious circumstances, and instituted an ill-advised prosecution.

We come now before this appellate tribunal, presenting the entire case and confidently rely upon a judgment of vindication.

Our principal grounds are:

1st. The insufficiency of the indictment to charge an offense against the law;

2nd. The utter failure of the evidence to establish even the inadequate charge made by the indictment;

3rd. The error of the trial Court in refusing to take the case from the jury;

4th. The error of the Court in proceeding to pass judgment against the defendants, upon a verdict that should have been set aside.

5th. The error of the Court in admitting in evidence the relinquishments to the Government.

So relying, we respectfully submit that the judgment should be reversed and the indictment dismissed.

R. S. TAYLOR,
BERT SCHLESINGER,
S. C. DENSON,
Attorneys for Plaintiff in Error.

No. 1865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE W. DWINNELL and JOHN GILPIN,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ROBERT T. DEVLIN,
United States Attorney,
A. P. BLACK,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Filed this.....day of November, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 1865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

GEORGE W. DWINNELL and JOHN GILPIN,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

George W. Dwinnell, John Gilpin, John D. Gagnon and Rex F. Deter, along with other unknown persons, were charged with *Conspiracy* to commit the crime of subornation of perjury, in procuring some six or seven persons to appear in the United States Land Office at Redding California, on Oct. 31, 1906, and to take oath before the Register of said Land Office to certain so-called "sworn statements" on their applications for timber land under the Timber and Stone Lands Act, covering certain public lands in the Redding Land District. Before the

trial, John D. Gagnon, one of the defendants, died. The defendant Dwinnell demurred to the indictment and the demurrer was overruled.

At the trial the defendant Rex F. Deter was acquitted and the two defendants, George W. Dwinnell and John Gilpin, were convicted

Motions for a new trial and in arrest of judgment were interposed and denied.

Each of the defendants was sentenced to pay a fine of One Thousand Dollars and to be imprisoned in the Alameda County Jail for one year.

The case is now before this court on a writ of error.

For the sake of brevity the plaintiffs in error will be referred to as the "defendants" and the defendant in error will be styled the "Government".

The assignments of error will be considered in the order set out in the transcript, beginning at page 41.

1.

THE DEMURRER WAS PROPERLY OVERRULED.

The crime charged was *conspiracy* to suborn perjury before the Register of the U. S. Land Office at Redding, California, Oct. 31, 1906, in applications for timber land. It is charged in the indictment that the defendants *"did wilfully, unlawfully, "knowingly and feloniously conspire, confederate "and agree together and with divers other persons "to the Grand Jury unknown"*, etc., unlawfully,

wilfully and corruptly to suborn, instigate and procure four members of a family by the name of French, Clarence M. Prather and Arthur W. Jacquette to commit the crime of perjury by making sworn statements before the Register of the U. S. Land Office at Redding, which statements were known by all the parties, defendant and applicants alike, to be false.

It is unnecessary to repeat the entire indictment here, but it is referred to as occupying some eleven pages of the transcript, beginning on page 5 and ending on page 15 thereof.

The opinion of Judge De Haven on overruling the demurrer of defendant Dwinnell, found on pages 20, 21 and 22, transcript, gives a succinct and clear statement of the substance of the indictment and its sufficiency to charge the offense.

The demurrer sets out several grounds of objection to the indictment, some of which will be briefly considered.

(a) *"That said indictment does not state facts "sufficient to constitute a public offense against the "United States."*

The rule is well settled that if one hires another to take up land for the one's benefit and causes him to make a false oath to the effect that he is making the application for his own use and benefit when they both know that the statement so made is wilfully false, the oath so taken is perjury, and the

one procuring the oath to be taken is a suborner of perjury. So, too, where two or more conspire to have the same thing done it is equally an offense against the Government.

(b) *"That said indictment does not allege that "said applicants, or any or either of them were "duly sworn to the said sworn statements."*

On page ten of the transcript the indictment alleges that the applicants did in fact appear before Leininger, the Register, at Redding, and did in fact sign their sworn statements and that the oath was in fact taken by, and administered to, each of the said applicants.

(c) *"That the indictment does not show that the "crime of perjury was committed by either of the "applicants"*, etc.

This statement is refuted by a mere reading of the indictment. On page 7, transcript, the language embraced in the sworn statement which is material is set out; and that each of the applicants when he should take the oath to the said statement, would know, and the defendants would know, that the said statement would be false in the material matter to the effect that, whereas, each should swear, among other things, that he had not made any agreement or contract in any manner, either directly or indirectly whereby the title he might acquire from the Government would inure in whole or in part to the benefit of any person except himself, the fact was

exactly the opposite; that each one of them had an express agreement and understanding that for the sum of two hundred dollars he was to go through the form of applying for the land, do all the necessary swearing and then turn over the land to the defendants.

And so with all the other points raised by the demurrer. A careful reading of the indictment will show that not a single objection made to it by the demurrer is founded in fact or is well taken.

2.

THE COURT DID NOT ERR IN REFUSING DEFENDANTS' REQUESTED INSTRUCTION NO. 42.

The instruction so numbered was not objectionable in itself but it was substantially covered by the court in another part of the charge and there is no obligation on the court to repeat instructions simply because requested to do so by counsel.

For the sake of assisting the court to see at a glance that the charge of the trial court was comprehensive and covered the case fully we shall put the requested instructions on the left and the instructions given on the right, in parallel columns. This will embrace "assigned errors" 2-3-4 and 7 (pp. 41-42 tr.).

Instructions Requested.	Charge Given by the Court.
No. 42 (Assigned Error "2", p. 41, tr.) "I charge you that if you find from the evidence in this case that any witness has wilfully testified falsely as to any material matter involved in the case, it is your duty under the law of this State to distrust the entire testimony of such witness."	(p. 261, tr.) "Every witness is presumed to speak the truth, but this presumption may be repelled by the manner in which a witness gives his testimony, by the character of the testimony offered, by the motives which may actuate a witness in offering his testimony, or by contradictory evidence, and any witness found by you to be wilfully false in a material part of his testimony is to be distrusted by you in other parts."
No. 37 (Assigned Error "3", p. 41, tr.) "If the jury are satisfied from the evidence that the *defendants* have established a good character for truth, honesty and integrity, then such good character of itself may be sufficient to raise a doubt as to the defendants' guilt."	"The defendants have introduced evidence of good character for truth, honesty and integrity. If you believe from the evidence that the good character of the defendants for truth, honesty and integrity is proven to your satisfaction, then such fact is to be kept in view by you throughout all your deliberations, and it is to be considered by you in connection with other facts in the case, and given such weight as you think it is entitled to. If, after consideration of all the evidence you believe any defendant is guilty as charged, why, then, it will be your duty to return a verdict of guilty, notwithstanding proof of good character." (p. 262, tr.)

No. 47 (Assigned Error 7, p. 42, tr.)

"I charge you that in considering the weight to be given by you to the testimony of any witness in this case you have the right to take into consideration the animus or the bias of such witness, if such animus or bias appears."

"I charge you that in considering the evidence of any witness in this case, you have the right to take into consideration whether or not such witness, in becoming a witness for the prosecution, expects favors from such prosecution or expects that he will be leniently dealt with in the disposition of his own case, and if you believe from the evidence, facts or circumstances in the case that such witness expects favors from the prosecution, you have the right and it is your duty to take such facts into consideration in weighing his testimony. That will go simply to the motive which may actuate him in testifying.

* * * * *

You are charged that a witness may be impeached by evidence that he has made at other times statements that are inconsistent with his present testimony. I repeat, quoting from the Code of this State, you are charged with the presumption that a witness speaks the truth may be removed or repelled by the manner in which a witness testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, *or by his motives for testifying* or by contradictory evidence and in this connection I charge you that you are the exclusive

judges of the credibility of any witness in this case. In other words, you must determine for yourselves whether you believe the testimony of any witness or not, and accordingly as you believe, you will act." (pp. 261-262-263, tr.)

The foregoing instructions show how fully the case was covered by the charge of the court and if you take in connection with the instructions just set out, the one following herein, it will be entirely clear that the jury were fully informed as to the law and as to their duty. The following instruction is found on pp. 258-9 transcript.

"The rules in reference to the presumption of in-
" nocence and the burden of proof are among the
" fundamental principles of our law, and must be
" regarded throughout your consideration of the evi-
" dence in this case. All presumptions of law inde-
" pendent of evidence are in favor of innocence,
" and every person is presumed to be innocent of
" the offense charged until he is proven guilty. *If*
" *upon such proof there is a reasonable doubt re-*
" *maining the accused is entitled to the benefit of*
" *an acquittal.* Before you can convict, the govern-
" ment must overcome the presumption of inno-
" cence by proving the defendants to be guilty be-
" yond a reasonable doubt, and if the jury have a
" reasonable doubt of the guilt as to either of the
" defendants, you should acquit as to that defend-
" ant."

The proof of good character is a part of the "proof" and when the jury are told that the evidence of the good character of the defendants *"is to "be kept in view by you throughout all your delib- "eration"*, it is not possible that any juror could have been misled as to the method by which he should arrive at a verdict.

3.

THE COURT DID NOT ERR IN REFUSING THE INSTRUCTIONS SET OUT IN ASSIGNMENTS OF ERROR "5" AND "6", p. 42 tr.

The court should never take the case from the jury unless there is a total failure of proof and in this case where the proof was so overwhelming, or to put it mildly, so contradictory, the whole matter was properly left to the jury.

4.

IF THE COURT WAS RIGHT IN OVERRULING THE DEMURRER, IT WAS ALSO RIGHT IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL AND IN ARREST OF JUDGMENT (Assignments of Error "8" and "9", p. 43 tr.).

As to the sufficiency of the indictment, more will be said later on in this brief.

5.

A MERE READING OF THE ASSIGNMENTS OF ERROR "10", "11" AND "12", pp. 45-6-7 tr., WILL SHOW THAT THE COURT WAS RIGHT IN THE RULINGS.

There is no principle more clearly established than that the acts and admissions of any particular conspirator may be shown against *him,* as long as he is carrying into effect the conspiracy charged against all of the conspirators.

6.

THERE WAS NO ERROR IN OVERRULING DEFENDANT DWINNELL'S OBJECTION TO THE QUESTION SET OUT IN "ASSIGNMENT OF ERROR 13" (p. 48 tr.).

John F. Fairchild was called as a witness to the good reputation of the defendants. Such a witness may properly be asked if he has heard of special instances wherein the good reputation of the defendants, or either of them, has been called in question.

People v. Ah Lee Doon, 97 Cal. 171;
Wigmore on Evidence, Sec. 988.

7.

THE COURT PROPERLY EXCLUDED EVIDENCE AS TO THE REPUTATION OF JOHN D. GAGNON ("Error 14", p. 48 tr.).

Gagnon was *dead.* He was, and is, beyond the jurisdiction of any earthly tribunal, and it is hard

to imagine upon what theory his reputation could properly be brought before the court when he was not on trial.

"Requiescat in pace."

It is unnecessary to speak of alleged errors "15, 16, 17" (p. 49 tr.) as to pronouncing judgment and sentencing the defendants.

At this point we were served with a seventy-five page brief by counsel for defendants and at the risk of being somewhat wearisome, it will be necessary to review some portions of the brief in question.

The whole argument of counsel for defendants in attacking the indictment *is based upon the false assumption that in charging the crime of conspiracy it is necessary to set out the crime the conspiracy was formed to commit with the same particularity as it would be if the crime itself were charged.*

Such is not the law. It is not necessary, for instance, to set forth all the particulars of a perjury defendants may have conspired to have committed, nor is it necessary to set forth all the particulars of a *subornation* of the perjury.

It is not necessary that a perjury should in fact be committed nor that a subornation of perjury should have been attempted; but it is entirely sufficient if the conspiracy were in fact entered into and any one of the conspirators did a single act to carry it into effect, even though the unlawful combination were then abandoned.

It is sufficient to charge the conspiracy in such manner as that if the defendants should be convicted thereunder they could successfully plead such conviction in bar of another prosecution for the same offense.

The Supreme Court of the United States has settled these principles and under the decisions of that tribunal the indictment here questioned must be held to be sufficient. These cases will shortly be considered.

Before reviewing the cases, however, some further general observations may not be out of order.

The courts take cognizance of the laws and regulations governing the acquisition of land at the various land offices in the public land states; and any man who knows anything at all about land *knows* that he goes to a United States land office to apply for *public land;* he *knows* that his *"sworn statement"* which is required by the regulations and the law alike has to do only with public land.

The "Timber and Stone Act" sets forth that it is *"surveyed public land"* that is to be sold and that an applicant to purchase said land must make a *written sworn statement* which statement *must be filed with the register,* and must set forth the various facts therein required.

Among the things to be sworn to is this: *"that he " has not directly or indirectly, made any agreement " or contract in any way or manner, with any per-*

"*son or persons whatsoever, by which the title he* "*might acquire from the government of the United* "*States should inure, in whole or in part,* to the "benefit of any *person except himself*".

Now the indictment here informs the defendants that they are charged with a conspiracy to have several people named, appear before the Register (duly qualified) of the United States Land Office at Redding, California, on a certain date, and there take an oath to sworn statement under the *Timber and Stone Lands Act of the United States*, each of which sworn statements should contain the very language just above quoted which sworn statements, after being sworn to should be filed with the Register of said land office, and that each of the applicants so swearing would know that he was swearing falsely and each of the defendants also, would know the applicants were swearing falsely and committing wilful and deliberate perjury.

Can it be seriously argued by any stretch of the imagination, that these defendants were not sufficiently informed of the charge they had to meet? Did they know or did they not know that the conspiracy was to get men to swear falsely in applying to purchase public land?

If they *knew,* then they were not prejudiced by the failure of the indictment to say in so many words that the oath to be taken by the applicants was to be wilfully false in reference to *public lands.*

Sec. 1025 Revised Statutes say:

> "No indictment found and presented by a Grand Jury * * * shall be deemed insufficient nor shall the trial, judgment or other proceeding therein be affected by reason of any defect or imperfection, in matter of form only, *which shall not tend to the prejudice of the defendant.*"

With these general observations, let us examine some of the cases upon this subject.

Among the latest and most important cases upon this subject is

> *Williamson v. United States,* 207 U. S. 425 (52 Law Ed. 278).

This was also a case of *conspiracy to suborn perjury under the Timber and Stone Act.*

The indictment was assailed "with great elaboration", and the same arguments were there advanced as are here used to have the indictment declared insufficient to charge an offense. Mr. Justice White wrote the opinion and said in part:

> "1. As to the sufficiency of the indictment.
>
> "With great elaboration it is insisted in argument that the indictment charges no crime, since there can be no such thing as a conspiracy to commit the offense of subornation of perjury. While the statutes of the United States cause every person who procures another to commit perjury to be guilty of subornation of perjury, it is said there is no punishment by statute, as at common law, for a mere attempt by an individual to induce the commission of perjury. This being so, the argument is that a charge of

conspiracy to suborn, etc., perjury, is in the nature of things but a charge of an attempt to suborn perjury, which amounts only to the charge of a conspiracy to do an act which is not a criminal offense. *But the proposition fails to give effect to the provisions of the conspiracy statute* (U. S. Rev. Stat. sec. 5440, U. S. Comp. Stat. 1901, p. 3676), which clearly renders it criminal for two or more persons to conspire to commit any offense against the United States, provided only that one or more of the parties to the conspiracy do an act towards effecting the object of the conspiracy. In other words, although it be conceded, merely for the sake of argument, that an attempt by one person to suborn another to commit perjury may not be punishable under the criminal laws of the United States, it does not follow that a conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is not a crime punishable as above stated. *The conspiracy is the offense which the statute defines, without reference to whether the crime which the conspirators have conspired to commit is consummated.* And this result of the conspiracy statute also disposes of an elaborate argument concerning the alleged impossibility of framing an indictment charging a conspiracy to suborn perjury, since it rests upon the assumption that as the conspirators could not, in advance, know when they entered into the conspiracy that the persons would wilfully swear falsely to what they and the conspirators knew to be false, there could be no conspiracy to suborn.

"But, even on the supposition that a valid indictment may be framed charging a conspiracy to commit subornation of perjury, the indictment in question, it is urged, *is fatally defective by reason of an omission to directly par-*

ticularize various elements claimed to be essential to constitute the offense of perjury, and other elements necessary to be averred in respect of the alleged suborners." (The italics are ours.)

"*This is based upon the assumption that an indictment alleging a conspiracy to suborn perjury must describe not only the conspiracy relied upon, but also must, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and perjury, which, it is alleged, is not done in the indictment under consideration.* But in a charge of conspiracy the *conspiracy* is the gist of the crime, and *certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy.*"

* * * * * * * * * *

Then, after stating the substance of the charge in the indictment, the learned Judge closes that part of the case which dealt with the sufficiency of the indictment as follows:

"It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon; and as the criminality of the conspiracy charged consisted in the unlawful agreement to *compass a criminal purpose,* the indictment, we think, sufficiently set forth such purpose. The assignments of error which assailed the sufficiency of the indictment are therefore without merit."

Another case bearing upon the sufficiency of an indictment for conspiracy is

Dealy v. United States, 152 U. S. 539 (38 L. Ed. 545).

Mr. Justice Brewer wrote the opinion of the court. In that case the indictment was also attacked on the ground of insufficiency because it did not specify the particular tract or tracts of land of which the defendants conspired to defraud the United States.

And speaking to that subject he said:

> "It is true, no tract is named by number of section, township, and range, and the language is broad enough to include any or all the public lands of the United States situate within that county, and subject to homestead entry at that land office. But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified.
>
> "In Dickinson's 'Guide to the Quarter Sessions', p. 355, is given the form of an indict-

ment for a like conspiracy which, as appears, was twice before the King's Bench. Rex v. Cooke, 2 Barn. & C. 615, 5 Barn. & C. 538. In that indictment the conspiracy is charged in these words: 'Did conspire, combine, confederate, and agree together unlawfully and unjustly to disturb, molest, and disquiet Sir George Jerningham, Bart., in the peaceable and quiet possession, occupation, and enjoyment of certain manors, messuages, lands, and hereditaments and premises, situate and being in the said county of S., of which he, the said Sir George Jerningham, then was, and for a long time had been, peaceably and quietly possessed.' In describing the overt act it is stated that defendant did 'break and enter a certain messuage, called Stafford Castle, situate in the county aforesaid, whereof the said Sir George Jerningham had long been, and then was, in the peaceable and quiet possession.' In other words, there, as here, the description in the conspiracy part of the indictment is broad enough to include any lands within the county belonging to and in the possession of the party against whom the conspiracy was formed, but when the overt act of the conspirators is stated then the particular tract in respect to which the act was committed is described.

"It is further objected that the indictment is defective in its statement of the means by which the conspiracy was to be carried into effect. The language is by means of 'false, feigned, illegal, and fictitious entries under the homestead laws of the United States.' It is insisted that the word 'entry' in homestead cases has a settled technical meaning, and refers simply to the initiation of the proceedings, and the language of Mr. Justice Lamar, speaking for this court in Hastings & D. R. Co. v. Whitney, 32 U. S. 357, 363 (33: 363, 366), is cited: 'Under the home-

stead laws three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered.'

"The argument is that the word 'entry', having a technical meaning, must be taken with that meaning in this indictment; that, as thus understood, an entry in a homestead case being but a preliminary act, does not operate to divest the title of the government, and, as is said in the brief: 'The charge that defendants conspired to defraud the government by means of false entries to lands under the homestead laws will thus be seen to be a charge of an innocent act.'

"But the popular understanding of the word is not thus limited. It is common to speak of an entry of land under the homestead law, meaning thereby not a mere preliminary application, but the proceedings as a whole, the complete transfer of title. Counsel concede that in cash purchase and pre-emption cases it is even technically used to describe the final proof or final purchase, but seek to draw a distinction between its use in those cases and under the homestead law. Even if it were conceded that such a distinction is recognized in the statutes and authorities, it would not change the significance of the popular use. *Clearly, it is used in this indictment in its popular sense, for, when we turn to the description of the overt acts, we find matters subsequent to the original entry.* Thus, in the first count, one of the defendants is charged to have induced 'Charles Pattnaude to make

> filing under said homestead laws, and thereafter to make proof and final entry under said laws, for the lands known,' etc. Something of equal significance is found in each of the subsequent counts upon which conviction was had. It is one purpose of an indictment to inform the defendant of the crime of which he is charged, and there can be no doubt that this defendant understood the exact sense in which the word 'entry' was used in this indictment, and was not misled into the belief that the only crime charged against him was of a conspiracy to acquire lands of the United States by means of wrongful preliminary proof."

In

United States v. Gordon et al., 22 Fed. 250,

a demurrer to the indictment under section 5440 R. S. for conspiracy to defraud the United States, was under consideration. *Nelson,* Judge, delivered the following opinion:

> "The three counts in the indictment charge that the defendant, with others, conspired to defraud the government out of certain public lands. There is no separate and distinct offense charged. The second and third counts allege the means which the defendant intended to use to consummate the fraud. This mode of pleading is not objectionable, and the demurrer cannot be sustained for the reasons assigned; that separate and distinct offenses are charged. The first count is good. The section of the statute (5440) makes it a crime to conspire to defraud the United States in any manner, and the cases cited from the state courts which hold that a conspiracy to defraud is not criminal, unless it is a conspiracy to defraud in a manner made criminal by statute, have no application to in-

dictments under section 5440. It is immaterial what means were used to defraud, as it is criminal to conspire to defraud the United States in any manner or for any purpose, and the court does not care to know whether the modes adopted to accomplish the end proposed is made criminal or not. The second count is sufficiently clear in its statements, and the acts which it is alleged the defendant conspired to do would defraud the government. Each count is followed by allegations of a large number of acts done in pursuance of and to effect the object of the conspiracy, and these allegations are identical. I think the lands are sufficiently described, and the defendant *is reasonably informed of the particular instances intended and referred to.* The third count is good. It charges with sufficient particularity that the defendant, with others, conspired to defraud the government out of the land by a pretended compliance with the pre-emption laws at the Duluth land office, in which district the lands were situated. The fourth count is good. It charges that the defendant and others conspired to defraud the government out of the lands by a pretended compliance with the pre-emption laws, for the purpose of selling them to the defendant. It charges a contrivance to secure the privilege of pre-emption, and a combination to defraud the government.

"Demurrer is overruled, with leave to plead."

In

United States v. Benson, 70 Fed. 591,

this court used the following language:

"We must therefore look elsewhere than to the common law for the test to be applied which will determine the validity of the indictment. Where the offense is purely statutory, having

no relation to the common law, it is, as a general rule, sufficient to charge the defendant, in the indictment, with the acts coming fully within the statutory description, in the substantial words of the statute, without any further elaboration. To this general rule should be added the qualification that the description of the offense in the indictment must be accompanied by a statement of all the particulars essential to constitute the offense, *and must be sufficient to inform the accused as to what he must be expected to meet at the trial.* U. S. v. Simmonds, 96 U. S. 362; U. S. v. Carll, 105 U. S. 612; U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144. * * *

"An indictment under section 5440, which avers the conspiracy and then sets out the overt acts done to carry it into effect, is sufficient, *and it is not necessary to aver the means agreed on to effect the conspiracy.* U. S. v. Dennee, 3 Woods 50, Fed. Cas. No. 14,948; U. S. v. Goldman, 3 Woods 192, Fed. Cas. No. 15,225; U. S. v. Dustin, 2 Bond 332, Fed. Cas. No. 15,011; U. S. v. Sanche, 7 Fed. 715; U. S. v. Gordon, 22 Fed. 250; U. S. v. Adler, 49 Fed. 736. See as to other offenses, U. S. v. Ulrici, 3 Dill. 535, Fed. Cas. No. 16,594; U. S. v. Simmonds, 96 U. S. 360; U. S. v. Britton, 107 U. S. 655, 661, 2 Sup. Ct. 512.

"From the authorities we have cited and quoted from, it will be observed that the gist of the offense under the statute, as well as at common law, is the *conspiracy.* The cases quoted from and cited are principally decisions rendered in the respective circuits, and have no binding force upon this court, except such as may be found in the soundness of the reasons therein given. Our attention, however, has not been called to any decision of the supreme court which takes issue with the circuit courts as to

the requirements of an indictment under the clause of section 5440 declaring it to be a conspiracy for two or more persons to conspire 'to defraud the United States in any manner or for any purpose.' On the other hand, there are decisions which substantially affirm the doctrines announced in the circuit courts. Some of them have already been cited in the course of this opinion." Citing Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680.

In the case of

Ching v. United States, 118 Fed. 538,

the Circuit Court of Appeals for the Fourth Circuit uses this language:

"As to the sufficiency of the indictment, it must be first noted that the gist of the offense charged is that of *conspiracy,* which we think is properly pleaded. *In such cases the offense which is intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime.* This indictment alleges that, prior to the commission of the crime charged, the defendant Guyther had been duly commissioned as an enumerator, and that he had regularly taken the oath of office. It also charges that the purpose of the conspiracy between the defendants was to have Guyther, as such enumerator, *forward fictitious returns relating to the residents of his district to the census bureau.* We think it clearly appears from the indictment itself that the defendants were fully advised of the nature of the offense charged, and of the means by which it was to be effected. Keeping in view the allegations that Guyther had been regularly appointed and qualified as an enumerator before the con-

> spiracy was entered into, and that the purpose of such conspiracy was to have him, *as such enumerator,* make certain fictitious returns, which are fully set forth, we are of the opinion that all of the defendants were fully advised of the charge which they had to meet, and that it sufficiently appears that Guyther was an enumerator at the time the conspiracy is charged to have been entered into."

In *Van Gesner v. U. S.,* 153 Fed. 53, which was also a case of *conspiracy to suborn perjury,* Judge Ross of this court said:

> "It is perfectly plain, from the provisions of the statutes and the rules and *regulations of the Land Department,* that in order for any person to effect a purchase of any land under the act in question, he must first make an application to purchase by a *verified written statement,* which statement is an affidavit as to the truth of the matters therein declared, and after a compliance with the prescribed procedure, must satisfy the register of the local Land Office by deposition, in which he and such witnesses as he may produce, are examined and cross-examined under oath of the truth of the matters required by the statute to be shown as a prerequisite to the authorized purchase."
>
> * * * * * * *
>
> "The whole scheme, as alleged, and proved to the satisfaction of the jury, shows beyond question that the false swearing contemplated by the conspiracy could not have been *otherwise than wilful on the part of the instigated persons.* When the facts alleged *necessarily import such wilfulness,* the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal at common law." (Citing cases.)

> "*It is not the name but the essence of the thing that should control the Court in the administration of justice.* As has already been said the gist of the offense charged against the plaintiffs in error was the *conspiracy,* the object of which was the commission of the crime of perjury by numerous persons, in order that the conspirators might acquire the government title to the desired lands. 'In stating the object of the conspiracy', said the Court in United States v. Stevens, (D. C.) 44 Fed. 141, '*the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required.* When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they may make a defense.' "

See, also:

Noah v. U. S., 128 Fed. 272;

U. S. v. Eddy, 134 Fed. 114;

U. S. v. Rhodes, 30 Fed. 431.

The learned judge also says:

> "It is well settled that the Land Department has the power to make reasonable rules and regulations, not inconsistent with any valid law, for the purpose of giving effect to the provisions of the acts of Congress providing for the disposition of the public lands, which have the force and effect of law, *and of which rules and regulations the Courts take judicial notice.*"

The court, therefore, will take judicial notice of the so-called "sworn statement" provided by the

Land Department under the "Timber and Stone Act", and when defendants are charged with conspiring to procure men to swear falsely in such "sworn statement" which is to be filed in the United States Land Office, of necessity, the lands are *public lands,* and the defendants are just as surely apprised of that fact as if the words "public lands" were repeated in each paragraph of the indictment.

This court also in the case of *Nickell v. U. S.,* 161 Fed. 705, which was also a charge of *conspiracy to suborn perjury,* speaking through the late, and greatly lamented, Judge Whitson, said:

> "First, then, as to the indictment: The argument is that the pleader has omitted to charge that the acts complained of were wilfully done. This is based on the assumption, rightly made, that it must so appear by appropriate averment. Assuming for the present discussion without holding that the words 'unlawfully, wilfully and corruptly' first appearing in the indictment cannot relate to the subsequent allegations as to the nature of the oaths taken for want of explicit reference, it does not appear that the acts were knowingly done, for it is alleged:
>
> "'When in truth and in fact as each of the said persons would then well know, and as they the said * * * Charles Nickell, etc. * * * would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with other persons by which the titles which they should acquire from the United States in such lands would inure to the benefit of persons except themselves.'

"We think the distinction which counsel makes is a technical refinement which cannot prevail under the liberal provisions of section 1025 of the Revised Statutes. *If the defendants knew that these affidavits would be false, and knew that the entryman would have made contracts for the conveyance of the lands to be acquired by them,* and having this knowledge, nevertheless procured the making of them, there can be but one conclusion, *and that is that they wilfully, which is but another name for intentionally, entered into the conspiracy charged.* While matters of substance are as essential now as before the passage of the statute, and of necessity must always remain so, we take it that its enactment was intended to have substantially the same effect as those of many of the states, *which provide that an indictment which will enable a person of common understanding to know what is intended is sufficient.*"

If that be the correct statement of the rule, that ends the discussion. There can be no question on earth but that these defendants *knew what was intended.* Not only that, but the overt acts set out in detail the method by which the conspiracy was to be carried into effect; and when the defendants came into court they knew not only what was charged against them, but also the very steps they were said to have taken in effecting the object of their conspiracy.

If they knew that, even though, for the sake of the argument, it were admitted the indictment is not as carefully drawn as it might have been, it is still sufficient.

But it is not admitted that the indictment is defective in any particular.

It is strongly insisted that measured by every standard for good pleading in a *charge of conspiracy,* it is entirely sufficient.

Let us look at it.

(1) It properly charges the *place* in which the conspiracy was entered into,—Siskiyou County, State and Northern District of California;

(2) That they did wilfully, unlawfully, knowingly and feloniously conspire, confederate and agree together, etc., *to commit the crime of subornation of perjury;*

(3) That they did this to unlawfully, wilfully and corruptly suborn, instigate and procure *six men* to commit the offense of perjury in the State and Northern District of California by appearing before Clarence W. Leininger, *a duly appointed, qualified and acting* register of the United States Land Office at Redding, California;

(4) That each one should take an oath to a *sworn* statement *under the Timber and Stone Lands Acts of the United States,* and (among other things) each should swear *"that he had not directly or indirectly "made any agreement or contract, or in any way "or manner with any person or persons whomso-"ever, by which the title he might acquire from the "Government of the United States would inure in "whole or in part to the benefit of any person except "himself";*

(5) That these sworn statements *were to be filed with said Register;*

(6) That it should be known by each one of the applicants so swearing and filing his application that it would be false in the *"material matter therein to "be sworn to,* in this, that each of the persons at the "time of *so subscribing and swearing* to his respec- "tive sworn statement, *had an agreement before- "hand, and an express understanding that the title "he was to secure, and the land he was to apply for "in his sworn statement, was for the benefit of the "said defendants";*

(7) *That the defendants,* and each of them at the time of so *conspiring* well knew that the said sworn statements aforesaid, so to be filed, *would be wilfully false in the said material matter just before stated.*

Now to make the crime, *the conspiracy,* complete for purposes of prosecution, an overt act has to be pleaded. The indictment then sets forth as an overt act to carry into effect the purposes of the conspiracy, that the defendants procured a number of the blank Timber and Stone Land sworn statements, under the rules prescribed under said acts, and did fill out the said sworn statements for *lands of the United States* to be open for entry under said acts, each applicant having his "sworn statement" filled out for a particularly described portion of land *subject to sale at Redding.*

That after that the said six applicants were "lined up" at Redding, in front of the Land Office, and that

defendant Dwinnell paid some money to them for their expenses.

That thereafter the defendants caused the said applicants to appear before the said Register and take the oath, and have the oath administered to them and that each did wilfully swear falsely to the material matter set out in said sworn statement, and that they all knew, defendants and applicants, that wilful perjury was committed.

This is followed by acts of defendant Dwinnell in relation to procuring relinquishments from the various applicants.

CASES CITED BY DEFENDANTS.

(1) *Dealy v. United States,* 153 U. S. 539 (38 L. Ed. 545).

This was a conspiracy to defraud the United States.

> "The first count was as follows:
>
> "That on the first day of April '1891' * * * in the County of Rolette, state of North Dakota, and within the jurisdiction of this court (Dealy and four others named and others unknown)—did commit the crime of conspiracy to defraud the United States, committed as follows:
>
> *"That at the time and place aforesaid the said (parties) did falsely, unlawfully and wickedly conspire, combine, confederate and agree together among themselves to defraud the United States of the title and possession of large tracts of land in said county of great value by means of false, feigned, illegal and fictitious entries of said lands under the homestead laws of the*

United States, the said lands being then and there public lands of the United States, open to entry under said homestead laws at the local land office of the United States at Devil's Lake City in said state. Then follows an *overt act* to the effect that one Pattnaude was persuaded to make a filing, and afterwards final proof on certain lands, *particularly described.*"

The Supreme Court sustained that indictment.

We submit that for stronger reasons the indictment here assailed should be sustained.

In the *Dealy* case the defendants were charged with conspiracy to defraud the United States out of *large tracts of public land open to entry at the land office at Devil's Lake City.* In *this* case the defendants are charged with conspiracy to have men *swear falsely* to *material matter* in *sworn statements under the Timber and Stone Lands Acts of the United States,* in which they should swear that they "*did* "*not apply to purchase the land on speculation* "* * * *and had not directly or indirectly made* "*any agreement or contract* * * * *by which the* "*title they might acquire* * * * *would inure* "* * * *to the benefit of any person except them-* "*selves*". That they knew it would be *wilfully false* and the defendants knew it would be wilfully false in the *material matter set out.*

In the *Dealy* case the *overt act* sets out the *particular land each applicant* was to enter upon. In *this* case the *overt act* sets out the *particular land* each applicant applied for in his *sworn statement* to purchase.

In both cases, taking the indictments in their entirety, the defendants are fully apprised of the charge made against them, and if a conviction were had it could be pleaded in bar of any further proceedings on the same charge.

In this case the defendants knew when they came to trial that they had to meet the charge of suborning several named persons to go to Redding and have each swear to and file a false sworn statement for the purchase of land which was particularly described in each application. The identity of the crime was thus fixed. It is charged in the indictment (p. 8 tr.) that to carry out their conspiracy "*the defendants did procure a number of blank* "*Timber and Stone Land Sworn Statements under* "*the rules prescribed under said acts, and did fill* "*out the said sworn statements for land of the* "*United States to be open for entry under the Tim-* "*ber and Stone Act of June 3rd, 1878, as extended* "*to all the public land states by the Act of August* "*4, 1892, as follows:*

"'*The sworn statement of James Frederick* "'*French was filled in for the east half of the east* "'*half of section twelve, township forty-four North,* "'*Range two west, M. D. M., in the District of lands* "'*subject to sale at Redding, California.*'"

And so with the five others set out. It is idle mockery to say that the defendants did not know what offense they were charged with.

Could the learned Judge De Haven have done otherwise than to say, as he did in his opinion overruling the demurrer of defendant Dwinnell (p. 20 tr.):

"After a careful consideration of the allegations "of the indictment my conclusion is that it suf- "ficiently charges that the defendant, and others, "conspired to commit the crime of subornation of "perjury"?

(2) *Nurnberger v. United States,* 156 Fed. 721.

This was a charge of *subornation of perjury* and does not apply to a *conspiracy case,* but in principle it supports the position of the Government in the case at bar. On page 724 it is said:

> *"The clear intendment is that the lands were public lands, and as such were at the time subject to entry at the said United States land office."*

In *that* case the paper was called *"a certain appli- "cation in writing to enter under the homestead "laws of the United States, subject to entry at the "said land office"*—then the land is described.

The indictment was sustained.

(3) The third case mentioned by defendants is *Williamson v. U. S.,* 207 U. S. 425, which has been sufficiently quoted from already, but the same case under the name of *Van Gesner v. United States,* 153 Fed. 46, may be considered in this connection.

Ross, Judge, wrote the opinion. In oral argument it was stated by Assistant U. S. Attorney Black, that the Williamson indictment did not set out the *particular lands* about which the perjuries were to be committed. What was meant by that is this: That in the *general statement of the conspiracy entered into, there is no description of particular lands to be entered,* and that it is only when the *overt acts* are charged it is stated for the first time what *particular land* each applicant was to apply for.

This seems to be borne out by the language of Judge Ross, on pp. 49 and 50.

The conspiracy was to procure one hundred persons to commit perjury by appearing before a United States Commissioner and swear falsely to

> "certain declarations and depositions by them to be subscribed" and *"to state and subscribe under their oaths that certain public lands of the said United States, lying in Crook county, in said district of Oregon open to entry and purchase under the Act of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase, in the manner provided by law,* etc. * * *"

Then follows the statement *"that in pursuance* of " the said unlawful conspiracy and *to effect the* " *object of the same",* Biggs then prepared *"a sworn statement in writing",*—and this is followed by a copy of the sworn statement which contains a *particular description* of *the land.*

That indictment was sustained by this court.

Now if the object of an indictment be to apprise a defendant of the offense charged against him, or, to quote the learned judge who wrote the Van Gesner opinion,

> *"fairly inform him of the acts alleged to have been committed by him in violation of that law and in a manner that will protect him in the event of a verdict of guilty, or acquittal, against any other further prosecution for the same offense",*

it is earnestly urged that the indictment now here under consideration comes fully up to that standard, and meets every requirement of the rule.

Does one who reads this indictment have any doubt on earth as to the particular offense charged? Is there any ambiguity about it? Could it ever again be possible to put these defendants on trial for this same offense, once this charge is disposed of?

In the *Van Gesner-Williamson* cases the facts are stated in a different way but not more plainly. In those cases it was charged that the men suborned were to appear before a U. S. Commissioner and swear falsely to

> "Certain declarations and depositions by them to be subscribed" and "to state and subscribe under their oath that certain public lands of the United States, lying in Crook county in said district of Oregon open to entry and purchase under the act of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the man-

> ner provided by law, were not being applied for on speculation", etc. * * *
>
> "When in truth and in fact as (all the parties) would then well know (that the opposite was true) and that the persons suborned '*would have made agreements and contract, etc.*'—with the defendants whereby the title should go to them."

In this case the parties suborned were to appear before the Register at Redding and swear falsely to "material matter" in sworn statements, under this same act, which statements were to be filed and would be known by all persons to be wilfully false in the "material matter" set out. If it was "material", it must have been for "public land". In both cases the *overt acts* point the specific land and fully apprise the defendants of the charge. *The indictment is sufficient and should be upheld.*

(4) *United States v. Britton,* 108 U. S. 109, is cited, but the reason therefor is not apparent. That case is authority for the proposition that

> "a conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy".

No one doubts the correctness of that doctrine but when that case is read, it will be seen that the facts set out as an offense which constituted the object of the conspiracy, *did not constitute an offense against the United States.* In other words the defendants there were charged with a conspiracy

to commit the acts set out in Sec. 5204, R. S., and the learned Justice said "*and Section 5204 does not "of itself create any offense against the United "States*" (27 L. Ed. p. 698).

(5) *United States v. Pettibone,* 148 U. S. 197;
United States v. Brace, 149 U. S. 870;
Conrad v. U. S., 127 Fed. 797;
Evans v. U. S., 153 U. S. 584,

are all cited to the same effect as the *Britton* case and need no further comment in this connection.

The argument under "C", pp. 22 to 26 of counsel's brief is applicable to cases of subornation of perjury and not to conspiracy.

Points "D" and "E" on pp. 26 to 32 of the said brief dwell upon alleged defects of the indictment in reference to the "agreement or understanding" that existed between the applicants and the defendants in reference to the lands to be applied for.

If an agreement or understanding was in fact had, that is the ultimate fact which must be alleged and the evidence must show such to be the fact. We are not called upon to set out the evidence of the agreement but must allege the *fact* of an agreement and then prove it.

> *"It is neither necessary nor proper to allege matters of evidence in a pleading; only ultimate facts should be alleged, not the circumstances which tend to prove them."*
>
> *31 Cyc.,* 49.

There was no variance between the allegations of the indictment and the proof.

The charge was conspiracy to suborn witnesses to commit perjury in swearing in their applications that they "had no agreement or contract", etc., as to the disposition of the lands applied for, when they all knew that that statement was wilfully false for the reason that each one of them had an agreement beforehand and an express understanding *" that the title he was to secure, and the land he was " to apply for in his sworn statement, was for the " benefit of the defendants".*

The word "title" must be taken in its popular sense of "right", and not in the restricted legal sense.

One may have an "inchoate" title, an "equitable", a "legal" title.

The language is *"by which the title he might acquire, etc.";* and while the conspiracy may have contemplated the possible issuance of *patents* to the applicants, yet if anything short of that is agreed to, with the understanding *that, in any event, whatever rights are acquired by the applicants they shall be for the benefit of the defendants,* it is entirely competent to show the facts. This is illustrated by the testimony of F. M. French on pages 91-2 tr., as follows:

" Q. Did you not, afterwards, failing to get the " money there, go to Dr. Dwinnell, and ask him

" to go and get some parties who would lend you " some money to made your final proof?

" A. *I never did, but Mr. Dwinnell went to Mr.* " *Eddy, and Mr. Dwinnell said that it would be best,* " *it would look better to have somebody else furnish* " *the money and put it up, and when he was talking* " *about having us prove up on the land, so I under-* " *stand by him that he went to Mr. Eddy to get the* " *money,* but as for my going to borrow one dollar " to prove upon the land, I never done it.

" Q. Then you never intended to take up that " land on that title for yourself?

" A. *I was taking it up for Dr. Dwinnell.*

" Q. Were you ever intending to perfect that " title; I want an answer to that, yes or no?

" A. *If the title had been perfected the land was* " *to be turned over to Dr. Dwinnell.*

" Q. That is not the question, the question is did " you ever intend yourself to take up that title that " you had initiated there?

" A. You see it is just this way: *The bargain* " *was made that Dwinnell was to get that land. It* " *did not matter whether it was proved up, or relin-* " *quished on, or scrip.*"

That clearly shows the situation. *Whatever title might be acquired was to go to Dwinnell.*

The statute does not say the *"legal title"* he might acquire.

When the application is made and filed and the fees paid, the applicant then has, at least, an *inchoate*

title. This "title" he may dispose of. It is his against the world. He is in a position to relinquish his right, to prove up and get final certificate, wait for his patent or anything else he desires.

> *"After the filing of a statement and while the time is running within which to make proof, there is an inchoate right on the part of the pre-emptor which the government recognizes."*
>
> *Northern Pac. R. Co. v. De Lacey,* 174 U. S. 622.

That "right" may justly be considered, for all criminal purposes, *the "title" which he acquires,* even if he concludes to dispose of it before going further and getting his equitable title by final payment, or waiting for the *legal title* as evidenced by patent.

> "Possession under a claim of ownership *constitutes title in a low degree. It is sufficient to give plaintiff standing to bring an action against those who have no title at all."*
>
> *Waller v. Julius,* (Kan.) 74 Pac. 157.

If this be not the true construction of the language and spirit of the act, then the act becomes an absurdity. It would then be necessary to show in every case that the *perfect legal title* had to be acquired and turned over to the suborner before there could be a violation of the law.

On page 45 of their brief under "B" it said "There was no evidence of conspiracy".

The testimony of Jacquette alone is sufficient to *show complicity of all the defendants.* Beginning

on page 142 tr. and ending on p. 159, there is disclosed as pretty a piece of land juggling as one would wish to see. It starts with defendant Gilpin holding out the lure of $200.00 to an honest young teamster (p. 143). The next scene shows defendant Dwinnell meeting Jacquette on the road and without any prior talk between them at all, Dwinnell hands Jacquette an affidavit to be sworn to and fifty cents to pay for it, enclosed in an envelope already addressed to the Register of the U. S. Land Office at Redding (pp. 144-5 tr.).

Scene 3: Gilpin pays the money for the railroad tickets from Montague to Dunsmuir (as a blind) and then Jacquette bought the ticket from Dunsmuir to Redding (p. 145 tr.).

Scene 4: Deter fills out the "sworn statement" and the boys get in line (p. 147 tr.).

Scene 5: Gilpin fixes matters so that if the land Jacquette was to apply for should have been spoken for ahead of him, he could by filing his homestead application, still secure that particular piece of land (p. 149 tr.).

Scene 6: In Gagnon's saloon (p. 151 tr.) Dwinnell said to Jacquette, *"Now if you are ready we will " go down and fix up that business".*

And the "contract"—the "agreement"—was carried out. Jacquette got his *two hundred dollars. The defendants got the land* (p. 156 tr.).

On page 154, in speaking of defendant Gilpin, this witness says:

"A. *Told him I did not like that transaction;*
"*that it looked to me like straight perjury. He told*
"*me if I kept my mouth shut it would be all right.*"

And the perjury was committed.

On whom rests the moral responsibility for this crime?

The jury have determined that these defendants entered into a conspiracy to have it committed and the transcript shows beyond any doubt that the defendants are guilty. Conspirators do not *say* they are going to commit a crime. They just do it and "keep their mouths shut".

CONCLUSION.

The "conclusion" of the able brief of counsel for defendants is a plea which might well have been addressed to the jury who tried the defendants.

As to why the jury should believe one witness rather than another is a matter which does not concern us here. The jury are told they have the right to do that very thing.

The excerpts from the testimony quoted at the end of the said brief are to no purpose, as they are all directed to disputed questions of fact which were submitted to the jury.

And if the elder French was shown to have had hatred for and animosity towards Dwinnell, the jury were properly instructed as to how they should weigh the testimony of such a witness.

It is respectfully submitted that no case was ever tried where the testimony more clearly showed the guilt of a defendant than this one.

All the defendants working together to a common end—to procure men to take up land for the purpose of turning it over to the defendants at such time as it would be convenient for the defendants to handle it.

The case was fairly tried—the issue was joined—the defendants knew the full charge they had to meet—they gave testimony and produced evidence upon all controverted points and it is claimed on behalf of the government that this judgment should be affirmed.

Respectfully submitted,

ROBERT T. DEVLIN,
United States Attorney,

A. P. BLACK,
Assistant United States Attorney,

Attorneys for Defendant in Error.

No. 1865.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE W. DWINNELL and JOHN GILPIN,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Plaintiffs in Error.

Filed this ..... day of December, 1910.

....., Clerk.

By ....., Deputy.

Whitaker & Ray-Wiggin Co., 770-776 Mission St.

No. 1865.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE W. DWINNELL and JOHN GILPIN,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR

We have carefully read the brief submitted by defendant in error and confidently submit that learned counsel for the government have not answered any of the various points urged in support of the plaintiffs' writ of error.

None of the cases cited by them contradict or overrule the cases relied upon by plaintiffs in error, but on the contrary are in direct harmony with them. The learned counsel do not seek to uphold the validity of

the indictment in this case, except by mere assertion, and are compelled to concede that it is lacking in many essential elements.

We insist that the indictment is fatally defective.

The crime charged is conspiracy to procure certain persons to commit perjury, and while it was not required that the indictment should contain all the averments requisite to set out a charge of perjury or subornation of perjury, it was indispensable that it should contain such averments as would show that if the conspiracy was successful, perjury would be committed; it was necessary that all the ingredients of perjury should be in contemplation.

I.

The Indictment Should Have Charged the Crime Which is Alleged to Have Been Committed With Precision and Certainty, and Should Have Set Forth All of the Elements Necessary to Constitute the Offense Intended to be Punished.

As has been repeatedly stated the true test of an indictment is whether it contains every element of the offense intended to be charged.

The modern decisions have not dispensed with this requirement. The objections urged with respect to this indictment are not technical. They are objections of substance and concern the constitutional rights of the accused. The objections of the plaintiffs in error to the indictment were made opportunely, both by demurrer and motion to arrest the judgment. The government had ample opportunity to reframe a proper

indictment, having been given actual notice of the various defects pointed out. One has only to glance at the indictment to see these defects. They may be grouped as follows:

(a) *The indictment does not charge that any of the lands* (subject of the conspiracy) *were public lands of the United States.*

(b) *The indictment does not charge that any of the lands were subject to entry at the Redding Land Office.*

(c) *The indictment does not describe the lands* (not public lands) *as being within any certain county, or located within any certain township, or within any certain state, or within the United States.*

(d) *The indictment does not charge that the entrymen were to apply for any public lands, either within the Shasta Land District, or within the United States, or were to apply to purchase any public lands at all.*

(e) *The indictment does not charge that any oaths were to be administered in a case in which the laws of the United States authorized an oath to be administered.*

(f) *The indictment does not state that the register mentioned therein, or before whom the entrymen were to appear, had any competent authority, or any authority, to administer such oath to the entrymen.*

All of the cases recognize the principle that the omission to set out any one of the above elements renders an indictment fatally defective, and that it should be so declared, either on demurrer or motion in arrest of judgment. We have covered this phase of the case

in our opening brief, commencing at page 1 and terminating at page 15.

Counsel for the government do not deign to notice the authorities cited by us in support of our contentions, but studiously avoid mentioning the case of Haynes vs. United States, 110 Fed. 819, in which the Circuit Court of Appeals emphatically disposes of the question, now under discussion, by saying:

> "It does not charge what lands Gifford was prevented from entering, *nor that they were public lands*. This count is therefore clearly bad and no conviction thereunder can be sustained."

CASES CITED BY COUNSEL FOR THE GOVERNMENT, WITH RESPECT TO INDICTMENT, REVIEWED.

Counsel cite Section 1025 of the Revised Statutes by way of apology for the indictment and to excuse the manifest defects appearing in it. This section cannot help counsel as the defects pointed out are not with respect to "matters of form," but involve the substantial rights of the accused, which cannot be cured by the section referred to. It has been repeatedly held that this section is not to be construed as sanctioning the omission of any matter of substance, but shall only be held to apply where the defect complained of is that some element of the offense is stated loosely and without technical accuracy.

In speaking of this section Mr. Justice Brown in the case of Moore vs. United States, 160 U. S. 268 (16 Sup. Ct.), said:

> "The indictment would then reduce itself to a simple allegation that the said George S. Moore, at a certain time and place, did embezzle the sum of $1,652.59, money of the United States, of the value, etc., said money being the personal property of the United States, which generality of description would be clearly bad. As there was a demurrer to this count, which was overruled, we do not think the objection is covered by Rev. Stats., Sec. 1025, or cured by the verdict."

If this statute may be resorted to to save radically defective indictments, if by the aid of this statute a prosecutor may omit any or all elements of an offense, then why have indictments at all? Why would it not be proper for the government to merely mention the name of the defendant in the indictment and say that he is charged with a violation of a specified section of the Revised Statutes?

We will now review the cases cited by defendant in error in their order.

Williamson vs. United States, 207 U. S. 425; the indictment is not set out in full in the opinion. In speaking of the indictment, however, Mr. Justice White states:

> "It in terms charges an unlawful conspiracy and combination to have been entered into on a date and at a place named, within the district where the indictment was found, and the object of the conspiracy is stated to be the suborning of a large number of persons to go before a named person, stated to be a United States commissioner of the District of Oregon, and IN PROCEED-

> INGS FOR THE ENTRY AND PURCHASE OF LAND IN SUCH DISTRICT under the Timber and Stone Acts * * * and the said Marion R. Biggs, United States commissioner, aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States TO ADMINISTER THE SAID OATHS AND THE SAID OATHS BEING OATHS ADMINISTERED IN CASES WHERE A LAW OF THE UNITED STATES WOULD THEN AUTHORIZE AN OATH TO BE ADMINISTERED."

The indictment in that case was not assailed upon the grounds here urged. We have examined the indictment as it is reported in the 153 Federal, 46. It charges:

> "that the defendants conspired together to procure a large number of persons, to-wit: one hundred persons, to commit the offense of perjury in the said District of Oregon by taking their oaths respectively before a COMPETENT OFFICER AND PERSON IN CASES IN WHICH A LAW OF THE SAID UNITED STATES AUTHORIZES AN OATH TO BE ADMINISTERED * * * to state and subscribe under their oaths that CERTAIN PUBLIC LANDS OF THE SAID UNITED STATES LYING IN CROOK COUNTY IN SAID DISTRICT OF OREGON, OPEN TO ENTRY AND PURCHASE UNDER THE ACTS OF CONGRESS, APPROVED JUNE 3, 1878, and AUGUST 4, 1892, AND KNOWN AS TIMBER AND STONE LAWS, &C."

The indictment concludes with an averment that Biggs was authorized by law of the United States to administer an oath, and that the oaths would be administered in cases where a law of the United States would then authorize an oath to be administered.

Tested by this indictment the indictment in the case at bar must clearly fail. The parts quoted are omitted from the indictment with which we are now dealing.

Counsel is clearly in error in his statement that the points here urged were advanced in Williamson vs. United States, *supra,* they could not have been so advanced for the indictment is not defective in these particulars; on the contrary, the pleader did not omit any of the essential elements of the offense.

In Dealy vs. United States, 152 U. S. 539, the case next cited by defendant in error, the indictment was attacked on the ground of insufficiency, because it failed to specify the particular tract, or tracts, of land of which the defendants conspired to defraud the United States. The description in the indictment, which learned counsel omits to give, is as follows:

> "LARGE TRACTS OF LAND IN THE COUNTY OF ROLLETTE, STATE OF NORTH DAKOTA, SAID LANDS BEING PUBLIC LANDS OF THE UNITED STATES OPEN TO ENTRY UNDER THE HOMESTEAD LAWS AT THE LOCAL LAND OFFICE OF THE UNITED STATES AT DEVIL'S LAKE CITY IN SAID STATE."

The court held that, notwithstanding that no tract

was named by number of section, township and range, the language was broad enough to include any public lands within that district, subject to homestead entry at that land office.

"It is enough," said the court, "that their purpose " and their conspiracy had in view the acquiring of " some of those lands."

We invoke this decision as being clearly in our favor. We concede that no particular tract of land need be described, but the indictment should have contained an allegation that the defendants conspired to acquire:

(1) PUBLIC LANDS.

(2) THAT THE PUBLIC LANDS WERE SITUATED WITHIN THE SHASTA LAND DISTRICT.

(3) THAT THE LANDS WERE SUBJECT TO ENTRY UNDER THE LAND LAWS OF THE UNITED STATES.

(4) THAT THE LANDS WERE SUBJECT TO ENTRY AT THE LAND OFFICE AT REDDING.

(5) THAT THE REGISTER MENTIONED IN THE INDICTMENT HAD COMPETENT AUTHORITY TO ADMINISTER THE OATHS IN QUESTION.

Apologizing for repetition we are again compelled to say that it does not appear that these lands were public lands; that the lands were situated within the Shasta Land District; that the lands were situated in the United States; that the lands were subject to en-

try at the Redding Land Office; that the lands were subject to entry at all; that the register mentioned in the indictment had any authority to administer the oaths in question.

The Dealy case is not open to any of the objections pointed out; the case is clearly an authority in our favor.

United States vs. Gordon, 22 Fed. 250, is the next case in order; in this case the land is described as follows. We quote from the statement of the case at page 251:

> "IN EACH COUNT THE LAND IS DESCRIBED AS BEING 4,480 ACRES IN TOWNSHIP 63, N. RANGE 16 W. ACCOMPANIED BY THE ALLEGATION THAT A MORE PARTICULAR DESCRIPTION IS UNKNOWN TO THE GRAND JURY."

An objection was made that the lands were not sufficiently described. The court said:

> "I THINK THE LANDS ARE SUFFICIENTLY DESCRIBED and the defendant is reasonably informed of the particular instance intended and referred to. It charged with sufficient particularity that the defendant, with others, conspired to defraud the Government out of the land by a pretended compliance with the preemption laws at the Duluth Land Office, IN WHICH DISTRICT THE LANDS WERE SITUATED."

Surely this case is not authority for the defendant in error. It clearly upholds the contention of the plaintiffs in error with respect to the indictment. Here

we find not only a specific description of the land to be acquired, but an averment that the lands were situated within the district where the oaths were to be taken.

The next case in order is United States v. Benson, 70 Fed. 591. Why this case is cited by counsel for defendant in error we fail to understand. Counsel quotes from the very excellent opinion of Judge Hawley, but omits from his quotation this part of the statement of facts:

> "THEN FOLLOWS A DETAILED STATEMENT OF THE TERMS AND CONDITIONS OF THE CONTRACT TO SURVEY CERTAIN PUBLIC LANDS, WHICH ARE SPECIFICALLY DESCRIBED."

The question we are now dealing with was not raised in the Benson case, but the indictment in the case was clearly sufficient as it specifically described the land directly involved. In the indictment in the Benson case the lands were not only definitely described, but there was an allegation that the lands were "public lands of the United States and were and " are situated within the District and State of Cali- " fornia."

The next case cited is Ching vs. United States, 118 Fed. 538. This case does not decide the questions raised here and has absolutely no application.

The next case cited is Van Gesner vs. United States, 153 Fed. 53. This case has already been discussed. The lands, the object of the conspiracy, were described in the indictment as public lands of the Uni-

ted States situated in a certain county and a certain district open to entry and purchase, and the indictment directly averred that the register had power to administer an oath within that district.

The next case is Noah vs. United States, 128 Fed. 272. This was an indictment for perjury. This case has no application to the point raised that the indictment is defective for its failure to state that the lands were public lands of the United States. It is an authority, however, clearly in favor of the plaintiffs in error upon the point that the indictment does not allege that the register had any authority to administer the oaths in question and we refer to it as in our favor upon that point.

The next case is United States vs. Eddy, 134 Fed. 114, the indictment was for perjury. The indictment charges that one Eddy "did appear in his own proper "person before William Q. Ramfy, who was then and "there the Receiver of the U. S. Land Office, * * * "and the said Eddy then and there * * * was in "due manner sworn by the said Receiver, who was "then and there AUTHORIZED BY THE LAWS "OF THE UNITED STATES TO ADMINIS-"TER SAID OATH."

The principal question presented for discussion was whether or not the indictment sufficiently charged that the oath made by the defendant before the receiver at Missoula, Montana, was willfully falsely taken. The indictment described the land specifically and set out that the receiver had power to administer the oath.

The case next cited is United States vs. Rhodes, 30 Fed. 431. This was an indictment for presenting a false claim; contained a distinct allegation "that the "notary public was authorized to administer oaths."

The remaining case is Nickell vs. United States, 161 Fed. 705. The points involved here were not raised in that case and indeed could not have been as the indictment contains enough matter to save it from criticism of the points here suggested. The indictment charged that the plaintiffs in error did "cor- "ruptly suborn one hundred persons to commit the "offense of perjury in the said district by taking their "oaths there respectively before COMPETENT "TRIBUNALS, OFFICERS AND PERSONS IN "CASES IN WHICH A LAW OF THE UNITED "STATES SHOULD AUTHORIZE AN OATH "TO BE ADMINISTERED. * * * THAT "CERTAIN PUBLIC LANDS OF THE SAID "UNITED STATES OPEN TO ENTRY AND "PURCHASE UNDER THE ACTS OF CON- "GRESS APPROVED JUNE 3, 1878, AND AU- "GUST 4, 1892, AND KNOWN AS TIMBER "AND STONE LAWS, ETC. * * * being tri- "bunals and officers authorized by the law of the Uni- "ted States to administer the same oaths."

The indictment was not assailed on the grounds here pointed out. The question of the sufficiency of the description was not raised. The indictment does call the lands "public lands of the United States open "to entry and purchase, etc."

GOVERNMENT'S ANALYSIS OF INDICTMENT CONSIDERED.

Counsel concludes his citation of cases with an analysis of the indictment (page 28) and says:

> "That measured by every standard for good pleading of a charge of conspiracy it is entirely sufficient."

Learned counsel then enumerates several reasons as establishing its sufficiency:

> "(1) It properly charges the place in which the conspiracy was entered into—Siskiyou County, California."

Surely counsel cannot contend that the venue could have been omitted from the indictment, and surely counsel cannot seriously contend that the mere naming of the place of the alleged crime implies any charge that the crime was an offense against the laws of the United States. Offenses committed in Siskiyou County are not necessarily of Federal jurisdiction.

> "(2) That they did willfully * * * conspire to commit the crime of *subornation of perjury.*"

Surely counsel do not contend that this is any charge, that the subornation of perjury was with respect to any matter, or matters, over which the Federal Government had jurisdiction. The defendants may have conspired together to commit the crime of subornation of perjury with reference to some matter, or matters, cognizable in the state courts only.

> "(3) That they did this to unlawfully procure

six men to commit the offense of perjury by appearing before Leininger, a duly appointed register of the United States Land Office at Redding, California."

Surely there is no charge contained here to show that Leininger had any authority to administer any oath, or that he was to administer any oath in any matter over which he had jurisdiction, or that he had any competent authority to administer any oath with respect to any public lands, or that any public lands were involved, or any property of the Government involved, or any lands within his district involved, and the law only gives the register authority to administer oaths to applicants with respect to lands situated within his district.

He could not administer an oath to a bill in equity or to a pleading in any court, or to any other document or proceeding not connected with the disposition of public lands, open to entry, located within the boundaries of his land district as established by act of Congress. In all matters not so appertaining he has no more authority to administer an oath than any private citizen. The law does not denounce as a crime the taking of a false oath except in cases where the oath is administered by an officer vested with the legal authority to administer that oath, and in order to set forth in any pleading, criminal or civil, a charge of perjury, it must be distinctly averred or clearly shown that the officer before whom the oath was taken had the jurisdiction, the legal power, at the time and place, to administer the particular oath in ques-

tion. The Chief Justice of this State is not competent to administer an oath of any kind outside the boundaries of the State. A Justice of the Peace or Notary Public cannot administer an oath outside of his county. And the Register of a Federal Land Office cannot administer any oath to any person except in matters relating to the sale or other disposal of public lands open to sale or entry at his particular land office and lying within the district over which he has jurisdiction. This proposition will not be controverted.

> "(4) That each one should take an oath to a sworn statement under the Timber and Stone Land Act of the United States that he had not directly or indirectly made any agreement, etc."

Surely it will not be contended that here will be found any statement that any public lands were involved, that the lands, the subject of the conspiracy, were open to entry in that land office, that they were situated within that land district, or that Leininger had any authority to administer the oaths in question.

Of course we know that many men do go to the Land Office on business concerning public lands, and we also know that the Timber and Stone Act sets forth that it is "surveyed public land that is to be sold," and that a written sworn statement must in certain cases be filed with the register, and we also know quite a lot of other things, but there are multitudes of things which we do not know, and some which we cannot even guess; one of those unguessable things is what was in the mind of the learned prosecutor at the time he

wrote this indictment and which he did not write therein, but reserved as a riddle for the defendants to guess at. The defendants may have had a suspicion as to the concealed or unwritten things, but the only man who was in the secret chamber of the grand jury and knew those things did not impart them by the indictment, and the defendants were not required to guess, they were entitled to be distinctly informed.

If the defendants were trying to grab public land through the means of subornation, and evidence of the facts sufficient to justify an indictment was in possession of the learned prosecutor, he should have written the facts in his indictment and then the defendants would not have been put to their guess; they would have known what was charged.

The learned counsel propose to the court this question: (page 13) "Can it be seriously argued by any "stretch of the imagination, that these defendants were "not sufficiently informed of the charge they were to "meet? Did they know or did they not know that "the conspiracy was to get men to swear falsely in "applying to purchase public lands?" and then give their own answer: "If they know, then they were not "prejudiced by the failure of the indictment to say in "so many words that the oath to be taken by the "applicants was to be willfully false in reference to "public lands."

But we cannot accept their answer, as it disregards all the written and unwritten law upon the subject, as well as the very traditions of our civilization. Defendants are presumed to be innocent until proven

guilty, but the Government's position as stated involves the reversing of the time honored rule.

Suppose an indictment charging that the defendant unlawfully and feloniously took, stole and carried away, one thousand dollars in United States gold coin, to which objection is made. In such case the learned counsel would argue that the defendant having stolen the money certainly knew where and in what jurisdiction he committed the theft, and the owner or custodian from whom he stole it, and therefore the prosecutor should be excused for omitting from the indictment some of the facts required by the law to be distinctly, clearly and unequivocally stated.

> "(5) That these sworn statements were to be filed with said register."

Here again is a total absence of averments of jurisdiction, that the register had any power to file them or to administer the oath in question, or that they related to public lands, or that they related to lands within his district, or that they related to lands which were open to entry. There is no attempt at description here, or any other place in the charging part of the indictment, nor is there any statement here that Leininger had authority to administer such oaths.

> "(6) That is, should be known by each one of the applicants so swearing and filing his application that they would be false in material matters there to be sworn to, in this, etc."

Here will not be found any statement of any kind or character that the lands were public lands; that they

were open to entry at the Redding Land Office; that they were situate in this country; or that the register had any authority to administer the oaths to the applicants or to file the applications.

It is well settled that perjury cannot be predicated upon a false oath, merely because it is false,—it must be false in a material respect. The indictment under discussion utterly fails in respect to both jurisdiction and materiality. In order that the defendants could be lawfully held to trial on the charge of conspiracy to commit subornation of perjury, the indictment would have to show that what the conspirators combined to do might result in the commission of perjury, that is, in procuring some one to commit the crime of perjury, and in order to comply with this requirement the indictment should have shown that the false oath which the defendants were contriving to procure to be made would be an oath affecting government lands within the jurisdiction of the register, lands within the Shasta Land District, which were open to entry, otherwise there would be lacking both the elements of jurisdiction and materiality. If the lands concerning which the alleged false oath was contemplated to be procured had been described, the Court could see that such lands were, or were not, within the limits of that land district, and concerning which the register had, or had not, power to administer an oath, but there is a total absence of any description of any lands; or, if it had been alleged that the false oaths contemplated were to be made concerning or affecting lands within the Shasta Land District the Court could see whether the

register would have jurisdiction to administer the oaths and that the oaths would be material, but the indictment wholly fails, not only to describe, but even to indicate or suggest, any particular land, or any locality in which such lands might be found. We do not contend that in an indictment for a conspiracy to commit subornation of perjury, it is essential that all the facts necessary in an indictment for subornation of perjury should be stated, but we do contend that all the facts should be stated to show that the conspiracy contemplated the doing of the things which would necessarily result in perjury.

A combination to procure some one to make a false oath before some person not shown to have authority to administer the oath, or to procure some one to make a false oath in some matter, not shown by the charge to be material, would not constitute criminal conspiracy, no matter how many acts were done to carry the design into effect.

The mere saying in an indictment of this nature that the oaths to be taken were in respect to *material* matter is wholly insufficient, for it must appear by apt pleading that the matter was material, and how material. It might or might not be material to correctly state the age of a person, but it would never be left to the pleader to give his conclusion that it was material.

In order to render the sworn statement in applying for timber lands material, it must appear by appropriate averment that the sworn statement referred to, would affect Government lands open to entry in the land district where made.

The principle recognized in the case of Haynes vs. United States (101 Fed. Rep. 817), and which is the established rule, is exactly what we contend for, and the opinion in that case clearly draws the line between a sufficient and an insufficient accusation. The first count was held bad because: "It does not charge what "lands Gifford was prevented from entering, nor that "they were public lands," and the other counts were sustained because they did state fully the very facts which were omitted from the first count. After an exhaustive examination of the reports we venture the assertion that no indictment for conspiracy to commit a crime was ever sustained by any Appellate Court where the statement of facts constituting the charge was as restricted as in the case at bar.

In Stearns vs. U. S., 152 Fed. 902, an indictment was held good expressly because it contained the very matter, the omission of which renders this indictment insufficient. No one can read that opinion without knowing that if the indictment there had been like the one here it would have been declared invalid.

Quoting from the opinion in Evans vs. U. S., 153 U. S. 584, as follows: "The indictment must fully, "directly and expressly, without any uncertainty or "ambiguity, set forth all the elements necessary to con- "stitute the offense intended to be punished."

> "(7) That the defendant well knew that said sworn statements to be filed would be willfully false in said material matter just before stated."

This does not show what the object of the conspiracy

was, whether it related to public lands, whether it related to lands situated within the Redding Land District, or to lands open to entry, or that Leininger had authority to administer the oaths.

Surely counsel will not contend that an indictment against a defendant for larceny of property of the United States would be good if the indictment omitted to state that the property belonged to the United States. Surely counsel will not contend that an indictment for uttering counterfeit coins would be good if the indictment omitted to state that the counterfeit coins were in the similitude of genuine coins of the United States.

We might continue to show by illustration how palpably defective is the indictment in the case at bar. Counsel seeks, however, to aid this fatally defective indictment by reference to overt acts. The courts have repeatedly held that a faulty conspiracy indictment may not be aided by averments of overt acts.

TRUE RULE CONCERNING INDICTMENTS OF THIS CHARACTER.

The true rule concerning indictments of this character is clearly stated by Circuit Judge Goff in United States vs. Balimore Railroad Company, 153 Fed. 1008, as follows:

> "The district attorney, claiming that the offense has been charged in the language of the statute said to be violated, insists that therefore it is sufficient. It is true that if the language of a statute, according to the natural import of the words used

in it, is fully descriptive of the offense, then ordinarily it is sufficient in alleging the commission of the crime created or punished by it. Potter vs. United States, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214. The rule that an indictment for a statutory misdemeanor is sufficient, if the language of the statute is used in charging the offense, is limited to cases where such words fully set forth all the assignments necessary to constitute the offense intended to be punished, without uncertainty or ambiguity. Evans vs. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. The indictment should leave no doubt in the minds of the accused and the court of the exact offense intended to be charged so that the defendant may not only know what he is called upon to meet, but also that a plea of former acquittal or conviction can be shown with accuracy by the record. United States vs. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States vs. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516. While the offense may be set forth in the general language of a statute, nevertheless it must be accompanied by a statement *of all the particulars required* to constitute the crime. Potter vs. United States, *supra;* United States vs. Benson, 70 Fed. 591, 17 C. C. A. 293; Potter vs. United States, 94 Fed. 127, 36 C. C. A. 105; Jackson vs. State, 91 Wis. 261, 64 N. W. 828."

This indictment does not come up to the test laid down in Cruikshank case, 92 U. S. 542, in which Mr. Justice Waite said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause

of the accusation', Amendment 6. In United States vs. Mills, 7 Pet. 142, 8 L. Ed. 636, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged,' and in United States vs. Cook, 17 Wall. 174, 21 L. Ed. 538, that 'every ingredient of which the offense is composed must be accurately and clearly alleged'. It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

A conspiracy indictment lacking in the elements here pointed out was held fatally defective in Conrad vs. United States, 127 Fed. 798 (C. C. A.).

The language of Mr. Justice White in the Williamson case, *supra,* is peculiarly applicable.

"We are of the opinion that the elaborate argument made by the government concerning the use in the indictment of the words 'declarations and depositions' can serve only to suggest ambiguity in the indictment and possible doubt as to the meaning of the pleader, but as of course in a criminal case, *doubt must be resolved in favor of the accused, we* hold that the indictment does not *charge a conspiracy to suborn perjury in respect to the making of the* final proofs, and therefore, that there was prejudicial error committed in the instructions to the jury on that subject which was excepted to."

II.

The Court Erred in Permitting in Evidence the Relinquishments.

Counsel has not attempted to answer this point, and indeed we do not see how it can be answered. Assuming, for the sake of argument, that the indictment charges a conspiracy to suborn witnesses at the time of the application to purchase, that is to say, that the witnesses should testify falsely. As to what the indictment does charge, or more properly speaking intended to charge, we quote from the opinion of District Judge De Haven (p. 22, Trans.):

"* * * * conspiracy charged is that both defendants conspired to induce the persons to commit perjury, in swearing that they had made no agreement directly or indirectly by which the title they might acquire, from the government should inure in whole or in part to the benefit of any other person, or persons—than the applicant—whereas,

in fact, each of said persons, at the time of so swearing, would have an agreement 'and an express understanding that the title he was to secure, and the land he was to apply for, in his sworn statement, was for the benefit of the said defendants.'

"It is, of course, well settled that the conspiracy charged cannot be enlarged or aided by the averment of acts done by one or more of the conspirators, even though it is alleged that such acts were done in furtherance of the object of the conspiracy.

"United States vs. Britton, 108 U. S. 199."

The Court distinctly holds in the opinion that the indictment does not charge a conspiracy to defraud the United States by covering the land with dummy or temporary applications, the applicants then to relinquish to the government.

The evidence showed that the alleged false testimony was given on the 31st day of October, 1906, in other words, upon that date the entrymen appeared before the register and made their affidavits. The relinquishments all bear date long after the termination of the alleged conspiracy, the earliest being November 26, 1906, and the latest December 1, 1906.

The evidence utterly fails to show any conspiracy, or even any individual intent, on the part of any of the defendants to procure any of the applicants to swear falsely, or that they had any agreement whereby the title they might acquire would inure to the benefit of any of the defendants.

In order that the conspiracy may exist, this at least is necessary—that the minds of the parties meet on the same thing and in the same sense in an agreement at some future time to do that thing.

The relinquishments had absolutely nothing to do with the case. They were absolutely inadmissible and they tended to prove another charge, viz.: that the scheme, if any, was to cover the land with dummy applications, then relinquish to the government, the defendants to then purchase the land from the government, after it had been restored to the public domain. This may, or may not, be a conspiracy to defraud the United States. It is not, however, as conceded by the lower court, in its opinion, the offense charged in the indictment. We repeat, the scheme, if any, was one of relinquishment, not the securing of title by entrymen for the benefit of the defendants. In fact the entrymen were not to acquire a title from the government, the entrymen never intended to procure any title, no title was to vest in them. The title was not to pass from the government at all. In other words, the government charged one crime and sought to prove another. We again insist that this evidence was inadmissible under the Williamson and Biggs cases, *supra.*

In Williamson vs. United States, 207 U. S. 175, Mr. Justice White said:

> "As, however, the question which we have hitherto passed over, concerning the admissibility of the final proof to show motive in making the original application, may arise at a future trial, even although it be that the indictment charges only a conspiracy to suborn perjury, as to the original application, we proceed to consider that subject.
> * * * *
>
> "As, then, there was no requirement concerning the making in the final proof of an affidavit as to

> the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose *ad interim* of his claim upon the final issue of patent, WE THINK THE MOTIVE OF THE APPLICANT AT THE TIME OF THE FINAL PROOF WAS IRRELEVANT, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the PROCUREMENT OF PERJURY IN CONNECTION WITH THE FINAL PROOF, and that the jury might base a conviction thereon, but in admitting the FINAL PROOF AS EVIDENCE TENDING TO SHOW THE ALLEGED ILLEGAL PURPOSE IN THE PRIMARY APPLICATION FOR THE PURCHASE OF THE LANDS."

In United States vs. Biggs (1908), 29 Supreme Court Reporter 181, a judgment was rendered quashing the indictment. The government appealed the case to the Supreme Court of the United States and Mr. Justice White said:

> "The Williamson case was a prosecution for a conspiracy in violation of Section 5440, Rev. Stat., to procure the commission of the crime of subornation of perjury by causing certain affidavits to be made for the purpose of acquiring land under the timber and stone act. At the trial, over exceptions, affidavits as to the *bona fides* of a number of applicants and of the purpose of each, in making his

application, to acquire only for himself, were offered in evidence, and like affidavits which were required by the rules and regulations of the Land Department at the time of the final entry were also offered in evidence. The government insisted that the papers were admissible because the indictment charged a conspiracy to suborn perjury, NOT ONLY AT THE TIME OF THE APPLICATION TO PURCHASE, BUT ALSO IN THE SUBSEQUENT STAGE OF MAKING THE FINAL ENTRY; and that, even IF THIS WERE NOT THE CASE, the affidavits made after APPLICATIONS WERE ADMISSIBLE FOR THE PURPOSE OF SHOWING THE MOTIVE WHICH EXISTED AT THE TIME THE APPLICATION WAS MADE. It was decided that the indictment only charged SUBORNATION OF PERJURY AT THE TIME OF THE APPLICATION. Passing on the alleged contention as to motive, it was held, that in view of the requirements as to affidavit exacted by the statute to be made at the time of the application, as to the *bona fides* of the applicant and his intention to buy for himself alone, and the absence of any such requirement in the statute as to the final entry, that the prohibition of the statute applied only to the condition of things existing at the time of the application to purchase, and did not restrict an entryman, after said application was made, from agreeing to convey to another, and perfecting his entry for the purpose, after patent of transferring the land in order to perform his contract. It was therefore held, that the affidavits made at THE FINAL STAGE OF THE TRANSACTION

WERE NOT ADMISSIBLE TO SHOW MOTIVE AT THE TIME of the applications to purchase, and that any requirements contained in the rules and regulations of the Land Department making an affidavit essential to show *bona fides,* etc., at the final stage, were *ultra vires* and void."

In London vs. United States, 171 Fed. 82 (1909), the Circuit Court of Appeals of the Eighth Circuit had under consideration an indictment for making false affidavit under the Timber and Stone Act. The government charged one crime and endeavored to sustain it by proof of another, and the Court said:

"As the plaintiff in error was convicted under section 4746, Revised Statutes of the United States, for the false making of an affidavit under section 2 of the Act of June 3, 1878, it necessarily follows that on the authority of the case above cited the judgment of the Court must be reversed, unless the conviction can be sustained under section 5392, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3653), being the general perjury statute. A careful consideration of the record leads us to the conclusion that NEITHER THE LAW NOR A DUE REGARD FOR THE ORDERLY ADMINISTRATION OF JUSTICE WILL permit the illegal conviction of the plaintiff in error under section 4746 to be SUSTAINED BY ENDEAVORING TO BRING THE INDICTMENT AND PROOF UNDER ANOTHER section of the Revised Statutes which might have been applicable had the UNITED STATES CHOSEN TO CHARGE the plaintiff

in error thereunder. False swearing under section 2 of the Act of June 3, 1878, subjects the offender to all the pains and penalties of perjury, and it is quite probable that the plaintiff in error in a prosecution for perjury would be entitled to instructions by the trial court that he would not be entitled to under section 4746, above mentioned."

It will be borne in mind that the indictment is not one to defraud the United States. It seeks to allege a conspiracy to suborn witnesses. The alleged conspiracy was consummated and completely terminated on August 31, 1906. (See page 1, Government's brief.) In support of this indictment the government merely introduced in evidence the relinquishments, the admission of which we complained of, and duly excepted to, and assigned as error.

III.

Variance.

In arguing as to the defective indictment much that has been said applies to the question of variance. The indictment seeks to charge a conspiracy to procure the applicants to make false oaths to timber land sworn statements, and that the falsity would consist in the fact that each of the applicants when he took his oath would have an understanding and an express agreement that the *title* he was to procure from the Government would inure to the defendants.

The opinion of the District Court clearly pointed out this, and as clearly indicated that the only evidence to show the falsity alleged would be evidence of such

agreements and understandings and that so much of the statements of overt acts as referred to relinquishment was surplusage.

The defendants went to trial upon this assurance, which became the law of the case. The prosecution did not pretend to offer any evidence whatever as to any understanding or express agreement, or any agreement whereby the *title* to be procured from the Government should inure to the defendants, but offered and relied upon evidence tending to show that the applicants had agreements with some of the defendants that they would file dummy applications upon parcels of land not intending to prove up or acquire any title from the Government, and afterwards relinquish their filings and allow the land to fall back to the Government so as to be open to entry by the defendants or any other person. Thus they would thwart the scheme of the United States in its manner of disposing of the public lands and thus defraud the Government. This was the very line of evidence which the District Judge, in ruling upon the demurrer, said would not be pertinent to the charge made. The evidence thus introduced tended to prove a charge that was not embraced in the indictment, but did not in any sense sustain, or conform to, the charge which was made and on which the defendants went to trial.

It must be remembered that the relinquishments introduced in evidence were arranged for and made some weeks after the consummation and ending of the alleged conspiracy, and so were not even admissible as overt acts, that is, acts done to carry the conspiracy

into effect, but they in connection with the testimony of a confessed perjurer, a man of the vilest character, were used to convince a jury that an entirely different thing was true. And the distinguished counsel for the United States say there is no variance!

The indictment charged an agreement to transfer title, while the proof showed an understanding that no title at all was to be acquired. The Government attempts to slur over this defect by the claim that the word title means any interest or claim of any character in the lands. An examination of the oath required by statute sets this matter at rest. The statute provides an oath of dual character, viz.: that the affiant does not apply to purchase the land on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and second, that he has not made any agreement or contract with any person by which the TITLE he "MIGHT" acquire would inure, etc.

If it was intended that such offense as it is claimed was here committed comes under this statute, then it clearly would come under the first clause thereof because in such a case the *application to purchase* would be on speculation and would not be for the use and benefit of the applicant. If the second clause of the statute comprehends such cases as the evidence of the Government tends to disclose, then why was there any necessity for the first clause? If an agreement to transfer title comprehends an agreement by which no title was to be secured, but rather an agreement by which the Government was to be defrauded and the propery taken out of the market for a limited time, then why

was the provision requiring non-speculation inserted? And if an agreement to transfer title includes an agreement to sell a relinquishment, what is the signification of the words of the statute requiring the applicant to take oath that he has not entered into any agreement to transfer "the title I may acquire from the United States?" If this does not refer to the future then language is meaningless. If it referred to the right which the applicant was acquiring by virtue of the signing of the application, then it would have been made to read "the title I am now acquiring." We admit that the word title is used in the same significance as it is ordinarily used in speaking of land transactions. If one says "I have title to land," or, "I hold title subject to mortgage," or, "They had suit over the title to land," it means in every instance the legal title. It does not mean an inchoate right of dower, or an estate of courtesy, or anything except the legal title. And especially is this the case in the statute in question, for it speaks of the title he may acquire from the Government of the United States, and that under the Timber and Stone Act is in fee. The fact is the Government has mistaken its remedy. If any, it was for fraud under Section 5440, United States.

The only thing that was ever given to the defendants by the relinquishments was an "opportunity,"—an opportunity to scrip the lands, an opportunity that was shared by every other person in the United States. An opportunity to do a thing is not in any possible sense a title of any kind to the thing concerning which the act may be done. If I give a person, in common

with every other person, an opportunity to purchase my property, I have not by so doing transferred to him any right or title to the property itself.

IV.

Insufficiency of the Evidence.

In order to avoid variance, the Government now says that the overt acts were not as alleged in the indictment, viz.: for the sale of relinquishments, but rather that they were to the effect that this real agreement, after all, was for the transfer of title to the defendants.

The Government formally apprises the defendants that the overt act which cut off the day of repentance of the conspiracy was the sale to the defendants by the applicants of their relinquishments for $200 each. They then produce six witnesses, four of whom swear positively on direct examination that their agreement was to relinquish; one says there was no agreement of any kind, and the last says he never had any agreement with defendant Dwinnell until after the entry. Upon cross-examination one of them, F. M. French, the ringleader of the conspirators to convict an innocent man, when he realized the possible effect of his evidence, said that the agreement was that Dwinnell was to get the land; and now nearly two and one-half years after the finding of the indictment in which the overt act in consummation of the prosecution of conspiracy was set out to be an agreement for the sale of relinquishments, the Government contends for the first time that the overt act was not as alleged, but was

rather one by which the title was to be transferred. We submit that the Government is bound by the averment of overt acts set out in the indictment and that it cannot discard the positive testimony of all of its witnesses except one, and because that witness contradicts himself, claim that the evidence supports a finding that the agreement was one for the transfer of title. The Government will not be permitted to play fast and loose, to allege in its indictment that the evidence is of one character and then to attempt to prove an overt act of a different character. It will not be permitted, even to secure the conviction of a guilty person, to discard all the evidence of all its witnesses and adopt the evidence of a single witness on cross-examination, especially when such evidence contradicts his evidence in chief.

If the relinquishments were improperly admitted in evidence then the Government must admit that the evidence is insufficient as there is no other evidence in the case.

V.

Instructions.

Defendant has shown in what respect the failure to give his requested instruction No. 37 regarding good character was prejudicial (Brief, p. 51), and the Government responds by merely printing the charge as given. That does not suffice. In the request asked for the jury would be properly instructed as to what weight might be given such testimony, while in the charge as given the jury were instructed that such evi-

dence "is to be considered * * * in connection "with the facts in the case and given such weight as "you think it entitled to." We have pointed out that the United States Supreme Court has held that a proper instruction is that evidence of good character is entitled to much weight. (Brief, p. 52.) In this case the good character of the defendant and the bad character of the Government's witnesses would have been a controlling fact with the jury under proper instruction.

The Government is absolutely silent as to the failure of the Court to give instruction 38, also referring to good character. (Brief, p. 57.) The request was the customary one to the effect that, if, after consideration of all the evidence in the case, including that bearing on good character of the defendants, the jury should then entertain any reasonable doubt of the defendants' guilt, then it was their duty to return a verdict of not guilty. Instead of this charge the Court instructed the jury that proof of good character should be given such weight as they thought it entitled to; that if after a consideration of all the evidence they believed the defendants guilty they should return a verdict of guilty, *notwithstanding proof of such good character.* This was tantamount to charging first, that they might give proof of good character such weight as they might think it entitled to, and second, that they might discard such proof altogether. Does not this error merit the attention of the Government in its effort to aid the Court to arrive at a just decision?

VI.

Conclusion.

We cannot close this brief without some reference to the conclusions regarding the testimony stated on page 41 of the Government's brief, and the state of mind which the Government's counsel is in, by virtue of consideration of the facts upon which such conclusions are based, shows how easy it is to sufficiently prejudice the mind of the average person by a recital of suspicious circumstances and how that prejudice may eventually result in a conviction of guilt without any real and substantial basis. Many of the circumstances which have impressed counsel are not even of themselves suspicious while all of the others can be fully explained and would have been so explained had the defendants not been led to believe that the case did not involve any issue except a contract to transfer the title which might be acquired. Counsel sees evidence of guilt in the fact that the railroad tickets were bought only to Dunsmuir and not to Redding. The parties eventually went to Redding and went in a body, and in what way could they avoid suspicion by going first from Montague to Dunsmuir and then from Dunsmuir to Redding? The fact was as stated in the testimony that the tickets were bought to Dunsmuir so that the people of Montague and vicinity would not know the purpose of their mission. They had one purpose, and only one purpose in so doing, and that was that there might not be others filing upon the same land which they were seeking to obtain.

The counsel sees evidence of guilt in the fact that Deter fills out a sworn statement and the boys get in line. Sworn statements are always filled out in an application for land under the Timber and Stone Act, and Deter was found by the jury to have been in no way a conspirator. Moreover, nothing is more common in the application for the Government's lands than for people to get in line.

Evidence of guilt is also claimed from the fact that witness Dwinnell said to applicants, "Now, if you are ready we will go down and fix up that business." Jacquette has testified that he had no transactions with witness Dwinnell until long after the applications had been made and that the only business he had with him was the sale of his relinquishment.

For some unaccountable reason the fact of this transaction having taken place in Gagnon's Saloon is ALWAYS mentioned by counsel. It is not apparent what bearing that has upon the guilt or innocence of the defendants and it is but evidence of the weakness of the Government's case even as to questions of fact, that they feel compelled to constantly drag into the argument a fact having no bearing upon the real controversy.

They carefully avoid any reference to the fact that absolutely no motive existed for the commission of the alleged crime; they do not say to this Court that the defendants could have gone to the land office and taken this land up under scrip without going through the routine of a timber and stone application and a subsequent relinquishment. The fact is, and the evi-

dence well supports it, that applicants sought to avail themselves of their timber and stone rights; that they were not able to raise the money to prove up themselves thereon; that when this condition arose they looked around for a purchaser of their relinquishments and found the same in part through the friendly aid of defendant Dwinnell. They do not call attention to the bitter animosity existing on the part of the applicants toward defendant Dwinnell because of the fact that at the time of the sale of their relinquishments he advised them that in his opinion they had not lost their timber and stone rights. If there is to be any discussion of the facts in this case on the part of the counsel for the Government, it seems as if in the interests of justice and fair play that these matters mentioned herein which are referred to on almost every page of the testimony should have been called to the Court's attention.

Respectfully submitted.

S. C. DENSON,
BERT SCHLESINGER,
R. S. TAYLOR,
Attorneys for Plaintiffs in Error.

NO. 1871

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of BENJAMIN GERBER, Bankrupt. FREEDMAN BROS. COMPANY, SHONINGER, HEINSHEIMER MFG. CO., SHAFF & BARNETT, LEVETT, CROSSMAN & CO., B. LIMON, MORRIS KASHOWITZ, CLASSMAN & NORTH, GAMSON & COHN, REGAL SILK GARMENT CO., BEN J. SCHMIDT & CO., EDWARD ISAAC & CO., BAUER BROS. & CO., J. J. PFISTER KNITTING CO., NEUBAUER BROS., HOLM & NATHAN, J. MIKOLA & BRO., JACOB RAPOPORT, M. HYMAN & CO., H. STERN, HIGH GRADE PETTICOAT CO., FLORENCE SUPPLY CO., and B. WEBSTER,

Petitioners,

vs.

NELSON W. PARKER, Trustee in Bankruptcy for BENJAMIN GERBER,

Respondent.

TRANSCRIPT OF RECORD.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of Certain Orders of the United States District Court for the Western District of Washington, Northern Division.

NO. 1871

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of BENJAMIN GERBER, Bankrupt. FREEDMAN BROS. COMPANY, SHONINGER, HEINSHEIMER MFG. CO., SHAFF & BARNETT, LEVETT, CROSSMAN & CO., B. LIMON, MORRIS KASHOWITZ, CLASSMAN & NORTH, GAMSON & COHN, REGAL SILK GARMENT CO., BEN J. SCHMIDT & CO., EDWARD ISAAC & CO., BAUER BROS. & CO., J. J. PFISTER KNITTING CO., NEUBAUER BROS., HOLM & NATHAN, J. MIKOLA & BRO., JACOB RAPOPORT, M. HYMAN & CO., H. STERN, HIGH GRADE PETTICOAT CO., FLORENCE SUPPLY CO., and B. WEBSTER,

Petitioners,

vs.

NELSON W. PARKER, Trustee in Bankruptcy for BENJAMIN GERBER,

Respondent.

TRANSCRIPT OF RECORD.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of Certain Orders of the United States District Court for the Western District of Washington, Northern Division.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY.

In the Matter of BENJAMIN GERBER,

Bankrupt.

FREEDMAN BROS. CO., et al.,

Petitioners for Review.

Notice of Filing Petition for Review.

To Messrs. McClure & McClure, Attorneys for Nelson W. Parker, Trustee in Bankruptcy for Benjamin Gerber, and Blaine, Tucker & Hyland, and Tworoger & Winkler, Attorneys for Benjamin Gerber, Bankrupt:

You are hereby notified that on the 21st day of June, 1910, I filed in the Clerk's office of the United States *Circuit of* Appeals for the Ninth Circuit, in the city of San Francisco, a petition for review in the above-entitled cause, a copy of which petition is hereto attached as a part of this notice, and that said case has been duly docketed in said court.

LEOPOLD M. STERN,

Attorney for Freedman Bros. Co. et al., Petitioners.

We hereby accept service of above notice this 24th day of June, A. D. 1910.

McCLURE & McCLURE,

Attorneys for Nelson W. Parker, Trustee in Bankruptcy of said Bankrupt's Estate.

BLAINE, TUCKER & HYLAND,

TWOROGER & WINKLER,

per J. B. R.

Attorneys for Bankrupt.

[Endorsed]: 1871. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Benjamin Gerber, Bankrupt, Freedman Bros. Co., et al., Petitioners for Review. Notice of Filing Petition for Review. Original. Filed Jun. 28, 1910. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of BENJAMIN GERBER,
Bankrupt.

Petition of Freedman Brothers Company et al., for Review.

To the Honorable, The Judges of the Circuit Court of Appeals of the Ninth Circuit of the United States:

Your petitioners, Freedman Bros. Company, Shoninger, Heinsheimer Mfg. Co., Shaff & Barnett, Levett, Crossman & Co., B. Limon, Morris Kashowitz, Classman & North, Gamson & Cohn, Regal Silk Garment Co., Ben. J. Schmidt & Co., Edward Isaac & Co., Bauer Bros. & Co., J. J. Pfister Knitting Co., Neubauer Bros., Holm & Nathan, J. Mikola & Bro., Jacob Rapoport, M. Hyman & Co., H. Stern, High Grade Petticoat Co., Florence Supply Co., and B. Webster, respectfully show:

That they are unsecured and general creditors of Benjamin Gerber, a bankrupt, who was so adjudged by the District Court of the United States for the Western District of Washington, Northern Division, on the 18th day of May, 1909.

That, after such adjudication, the following proceedings were had in the case of said bankrupt:

The said bankrupt on the 27th day of May, 1909, filed in said case, his schedule of assets and liabilities in Schedule B (5) setting forth the following as a statement of property claimed by him as exempt under the Acts of Congress relating to bankruptcy:

"In lieu of the exemptions allowed in subdivision 4, of section 841, of Pierce's, the bankrupt claims the sum of $250.00. The bankrupt also claims a sufficient sum out of the assets for provisions for himself and his family for a period of six months, as provided in subdivision 4, section 841, of Pierce's Code. The bankrupt hereby claims as exempt under the laws of the State of Washington relating to homesteads, the homestead occupied by himself and family more particularly described as Lot 3, Block 5, Cove Addition to Seattle, Washington."

That thereafter, on the 8th day of July, 1909, the said bankrupt filed with the Referee in Bankruptcy having said case in charge, his petition praying that his exemptions, as set forth in his schedule, be set aside to him, and thereupon, on the 12th day of October, 1909, the Trustee in Bankruptcy filed with the Referee his report of exempted property, which report set apart for the bankrupt the following among other exemptions:

"Under subdivision 4 of said sec. 5248, in lieu of cows, swine, bees and fowls, the sum of $250.00 in money; for the maintenance of the bankrupt and his family, consisting of his wife and one minor child,

the further sum of $25.00 per month for six months (aggregating $150.00), making a total lieu exemptions under said subdivision 4 of $400.00 money.

Under section 5237 of Vol. 2 of said Ballinger's Annotated Codes and Statutes, the following property, being the homestead upon which the bankrupt resides and resided at the date of the institution of these bankruptcy proceedings: Lot Three (3) in Block Five (5) of Cove Addition to the City of Seattle, King County, Washington, subject to all and singular the incumbrances and liens thereon."

That thereafter, on the 23d day of October, 1909, these petitioners served and filed with said Referee their exceptions to the Trustee's report setting off to the bankrupt the sum of $250.00 in money in lieu of cows, swine, bees and fowls under subdivision 4 of section 5248 of Ballinger's Annotated Code and Statutes of Washington, upon the ground that under said Statutes the bankrupt, while having the right to select from his property and retain other property not to exceed $250.00 in value in lieu of such animals, had not the right to waive his claim for specific personal property in the hands of his Trustee, permit the sale of such property in due course of bankruptcy by the Trustee and thereafter claim money to the extent of $250.00 from the funds in the hands of the Trustee.

Your petitioners also excepted to the allowance of $25.00 per month for six months (aggregating $150.00) for the maintenance of the bankrupt and his family in lieu of provisions and fuel allowed to the bankrupt under subdivision 4 of section 5248 of

Ballinger's Annotated Code and Statutes of Washington, upon the ground that said Statute does not authorize lieu exemptions to the debtor either in money or property in the absence of such provisions and fuel.

Your petitioners further excepted to the setting apart to the bankrupt as a homestead of the real property set forth in the Trustee's report of exemptions, for the reason that the said bankrupt upon the eve of bankruptcy, while insolvent and with full knowledge of his insolvent condition, and while contemplating and arranging for his adjudication in bankruptcy in the same case in which he was thereafter duly adjudged bankrupt, purchased said estate with money which was not exempt, and which was derived from the sale of merchandise in the business carried on by said bankrupt, which business immediately after such purchase came into possession and control of the bankruptcy court; that such purchase was made for the purpose of defrauding the creditors of said bankrupt and for the purpose of withholding the money used for said purchase from his creditors.

That thereafter, on the 8th day of December, 1909, the said report of the Trustee setting apart said exemptions to the bankrupt and said exceptions of your petitioners to said report came on for hearing before the Referee, and upon such hearing the Referee entered an order modifying the action of the Trustee, in that the amount which was by him set aside in lieu of certain animals in the sum of $250.00 be reduced to the sum of $150.00, and that the

amount set aside by him for the maintenance of the bankrupt and his family in the sum of $150.00, be reduced to the sum of $90.00; and in all other respects the action and report of the Trustee was approved.

That thereafter, on the 13th day of December, 1909, your petitioners filed a petition for review with said Referee which petition set forth that the order made by said Referee on the 8th day of December, 1909, with respect to the exceptions filed by your petitioners was erroneous, in that it allowed the bankrupt the sum of $150.00 in lieu of certain animals. And that said order was erroneous in that it allowed said bankrupt $90.00 for provisions for the maintenance of himself and family, and that said order was erroneous in that it overruled the objections of these petitioners to the setting apart to the bankrupt by the Trustee, of the homestead exemption claimed by said bankrupt.

That thereafter in response to said petition for review, the said Referee on the 13th day of December, 1909, filed in the office of the Clerk of the United States District Court his certificate and return, which certificate embraced his findings of fact and conclusions of law with reference to the controversy in relation to said exemptions, and thereafter the District Judge having reviewed said decision, filed his memorandum of decision on the 4th day of April, 1910, confirming the Referee's decision and thereafter on the 11th day of April, 1910, an order was duly made by said District Judge and filed, confirming the decision of the Referee in respect to said ex-

emptions, to which order these petitioners duly excepted and their exception was allowed.

Your petitioners further show that they are aggrieved by the orders of said District Court, and injured thereby, and that the errors complained of consist:

First: In said court holding that the Referee's decision allowing the bankrupt $150.00 cash from the funds in the hands of the Trustee, in lieu of those certain animals which debtor is allowed to select under subdivision 4 of section 5248 of Ballinger's Annotated Code and Statutes of Washington, was correct. It is the contention of your petitioners that said bankrupt had the opportunity to claim and have set apart to him other property in lieu of such animals, and having neglected to make such claim of lieu exemptions in specific property and having allowed all of the personal property in the hands of the Trustee to be sold, the bankrupt has thereby waived his claim to the exemptions allowed under said subdivision 4, and has no right to claim and have allowed to him any moneys in the hands of the Trustee as lieu exemptions.

Second: In said Court holding that the decision of the Referee setting aside to the bankrupt the sum of $90.00 for the maintenance of the bankrupt and his family in lieu of provisions and fuel awarded to a debtor under subdivision 4 of section 5248 of Ballinger's Annotated Code & Statutes of Washington, was correct. It is the contention of these petitioners that if no specific provisions and fuel are in the possession of the bankrupt or come into the possession

of the Trustee, that the bankrupt cannot in lieu thereof under said Statute claim and have allowed to him any lieu exemptions either in money or property.

Third: In said Court holding that the Referee's decision awarding the said bankrupt the homestead exemptions claimed and set apart to him by the Trustee was correct. It is the contention of these petitioners that the exemption law cannot be employed as an agency of fraud, and that the bankrupt knew himself to be insolvent when he invested his funds in said homestead, and that he made such investment for the purpose of withholding said funds from his creditors, and that he thereby worked a fraud upon his creditors which in law forfeited him his homestead exemptions.

Fourth: In said Court holding that the decision of the Referee in the matter of said exemptions be sustained and that said decision was correct in overruling the exceptions of these petitioners to the report of the Trustee setting apart the exemptions, to the extent to which said exceptions were overruled.

Your petitioners file with this petition a certified copy of so much of the record in said bankruptcy proceedings as is necessary to exhibit the manner in which the questions of law set forth in this petition arose, and their determination.

Wherefore your petitioners pray that such orders of the District Court be revised in matter of law by your Honorable Court, as provided in Section 24-B of the bankruptcy law of 1898 and the rules and practice in such case provided. And that by order

of this Court it be decreed that the order of the District Court sustaining the decision of the Referee in the matter of said exemptions be set aside and held for naught, and that it be decreed by this Court that the exceptions of these petitioners to the allowance of said bankrupt's claim of exemptions be sustained in every part and the claim of exemptions filed by said bankrupt be disallowed, and that your petitioners be given such other relief as shall be proper.

LEOPOLD M. STERN,
Attorney for Petitioners.

United States of America,
State of Washington,
County of King,—ss.

Leopold M. Stern, being duly sworn, on oath deposes and says: He is the attorney for the petitioning creditors above named; that he has read the foregoing petition, knows the contents thereof and that the same are true; that he makes this verification because none of the petitioning creditors named in the petition for review reside within the State and District of Washington, and for the further reason that affiant is familiar with all the facts set out in the foregoing petition.

LEOPOLD M. STERN.

Subscribed and sworn to before me this 18th day of June, A. D. 1910.

[Seal] B. T. WOODS, Jr.,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: The U. S. Circuit Court of Appeals, Ninth Circuit. In the Matter of Benjamin Gerber, Bankrupt. Freedman Brothers Company, et al., Petitioners for Review. Petition for Review.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983.

In the Matter of B. GERBER,

Bankrupt.

Schedule B (5) [of Schedule of Assets and Liabilities].

STATEMENT OF PROPERTY CLAIMED AS EXEMPT BY THE BANKRUPT, UNDER THE ACTS OF CONGRESS RELATING TO BANKRUPTCY.

Sub-section 1.

Under section 841 of Pierce's Code of the State of Washington, the bankrupt claims wearing apparel for himself and family to the value $100.00

Under sub-section 3, of section 841 of Pierce's Code, the bankrupt claims the following household goods and effects as exempt: 1 rocking chair, 8 chairs, 1 couch and cover, 2 beds and bedding, 2 tables, 2 dressers, 1 buffet, 4 rugs, 1 range and kitchen utensils, and other household goods and effects, total value..... 300.00

In lieu of the exemptions allowed in subdivision 4, of section 841, of Pierce's, the bankrupt claims the sum of..... 250.00

The bankrupt also claims a sufficient sum out of the assets for provisions for himself and his family for a period of six months, as provided in subdivision 4, section 841, of Pierce's Code.

The bankrupt hereby claims as exempt under the laws of the State of Washington relating to homesteads, the homestead occupied by himself and family more particularly described as Lot 3, Block 5, Cove Addition to Seattle, Washington.

BENJAMIN GERBER,
Bankrupt.

[Endorsed]: Schedule B-5 of Schedule of Assets and Liabilities. Filed in the U. S. District Court, Western Dist. of Washington, 9:20 A. M. May 27, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. ——.

In the Matter of B. GERBER,
Bankrupt.

Petition to Set Aside Exemptions.

Comes now B. Gerber, the bankrupt above named, and petitions the Court and shows as follows, to wit:

I.

That he has heretofore been adjudged a bankrupt in the above-entitled court. That his schedules

show that he is a married man and entitled to the exemptions allowed by law, and said bankrupt is now entitled to have the exemptions allowed by law as set forth in his schedules set aside to him.

II.

That your petitioner desires to have a discharge entered, as provided by law, and it will be necessary to pay the Clerk of the above-entitled court certain fees therefor.

III.

That your petitioner has employed attorneys to prepare his said schedules, and they are entitled to a reasonable compensation allowed by law.

Wherefore, your petitioner prays that his exemptions be allowed and that sufficient amount be ordered to be paid by the Trustee to the Clerk of the United States Court for his fees, to the "Post-Intelligencer" for publication, and that his attorneys be allowed reasonable compensation for their services and for such other and further relief as is meet and proper.

BENJAMIN GERBER,
Petitioner.

United States of America,
Western District of Washington,—ss.

B. Gerber, being first duly sworn, on oath deposes and says, that he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof and same is true.

BENJAMIN GERBER.

Subscribed and sworn to before me this 8th day of July, 1909.

[Seal] ELMORE WINKLER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Petition to Set Aside Exemptions. Filed July 8, 1909, 2:00 P. M. John P. Hoyt, Referee.

Filed in the U. S. District Court, Western Dist. of Washington, Dec. 13, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983.

In the Matter of BENJAMIN GERBER,
Bankrupt,

Trustee's Report of Exempted Property.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property under the provisions of the Acts of Congress relating to bankruptcy:

1. Under sec. 5248, subdivision 1, of Vol. 2, of Ballinger's Annotated Codes and Statutes of Washington: The wearing apparel of the bankrupt and of his family.

2. Under subdivision 3 of said sec. 5248, the following household goods and effects: 1 rocking chair, 8 chairs, 1 couch and cover, 2 beds and bedding, 2 tables, 2 dressers, 1 buffet, 4 rugs, 1 range and kitchen utensils and other household goods and effects of the total value of not to exceed $500.00.

3. Under subdivision 4 of said sec. 5248, in lieu of cows, swine, bees and fowls, the sum of $250.00 in money; for the maintenance of the bankrupt and his family, consisting of his wife and one minor child, the further sum of $25.00 per month for six months (aggregating $150.00), making a total lieu exemptions under said subdivision 4 of $400.00 money.

4. Under section 5237 of Vol. 2 of said Ballinger's Annotated Codes and Statutes, the following property, being the homestead upon which the bankrupt resides and resided at the date of the institution of these bankruptcy proceedings: Lot Three (3) in Block Five (5) of Cove Addition to the City of Seattle, King County, Washington, subject to all and singular the incumbrances and liens thereon.

Dated at Seattle, Washington, this 12th day of October, A. D. 1909.

NELSON W. PARKER,
Trustee.

[Endorsed]: Trustee's Report of Exempted Property. Filed Oct. 12, 1909, at 2:00 P. M. John P. Hoyt, Referee.

Filed in the U. S. District Court, Western Dist. of Washington. Dec. 13, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983.

In the Matter of BENJAMIN GERBER,
Bankrupt.

Exceptions to Trustee's Report Setting Off Exemptions.

Comes now Freedman Bros. Company, Shoninger, Heinsheimer Mfg. Co., Shaff & Barnett, Levett, Grossman & Co., B. Limon, Morris Kashowitz, Glassman & North, Gamson & Cohn, Regal Silk Garment Co., Ben. J. Schmidt & Co., Edward Isaac & Co., Bauer Bros. & Co., J. J. Pfister Knitting Co., Neubauer Bros, Holm & Nathan, J. Mikola & Bro., Jacob Rappoport, M. Hyman & Co., H. Stern, High Grade Petticoat Co., Florence Supply Co., and B. Webster, creditors of the above-named bankrupt, by Leopold M. Stern of Seattle, in the Western District of Washington, Northern Division, their Attorney, duly authorized to that end, and excepts to the Trustee's report setting off said bankrupt's exemptions, filed herein on the 12th day of October, 1909, as follows:

I.

Excepts to the setting off to the bankrupt of the sum of two hundred and fifty dollars ($250.00) in money in lieu of cows, swine, bees and fowls, under subdivision 4 of section 5248 of Ballinger's Annotated Code and Statutes of Washington, for the reason that under said statute the bankrupt may in lieu of such animals select from his property and retain other property not to exceed two hundred and fifty dollars in value, but has not the right to waive his claim for specific personal property in the hands of his Trustee, permit the sale of such property in due course of bankruptcy by the Trustee and thereafter claim money to the extent of two hundred and

fifty dollars ($250.00) from the funds in the hands of the Trustee in bankruptcy.

II.

Excepts to the allowance of twenty-five dollars ($25.00) per month for six months (aggregating one hundred and fifty dollars) for the maintenance of the bankrupt and his family in lieu of provisions and fuel awarded to the bankrupt under said subdivision 4 of section 5248 of Ballinger's Annotated Code and Statutes of Washington, for the reason that said statute does not authorize lieu exemptions, either in money or property, to the debtor in the absence of such provisions and fuel.

III.

Excepts to the setting apart to the bankrupt as a homestead of the real property described in paragraph IV of the Trustee's report, for the reason that the said bankrupt upon the eve of bankruptcy, while insolvent and with full knowledge of his insolvent condition, and while contemplating and arranging for his adjudication in bankruptcy in the above-entitled cause, purchased said estate with money which was not exempt, and which was derived from the sale of merchandise in the business carried on by said bankrupt, which business immediately thereafter came within the possession and control of the bankruptcy court; that such purchase was made for the purpose of defrauding the creditors of said bankrupt, and for the purpose of withholding moneys used for said purchase, from his creditors.

Wherefore, said creditors pray that a hearing may be had upon said exceptions and that the same may be argued, as provided in general order 17.

Dated, Seattle, October 23, 1909.

FREDMAN BROS. CO.
SHONINGER, HEINSHEIMER MFG. CO.
SHAFF & BARNETT.
LEVETT, GROSSMAN & CO.
B. LIMON.
MORRIS KASHOWITZ.
GLASSMAN & NORTH.
GAMSON & COHN.
REGAL SILK GARMENT CO.
BEN. J. SCHMIDT & CO.
EDWARD ISAACS & CO.
BAUER BROS.
J. J. PFISTER KNITTING CO.
NEUBAUER BROS.
HOLM & NATHAN.
J. MIKOLA & BRO.
JACOB RAPPOPORT.
M. HYMAN & CO.
H. STERN.
HIGH GRADE PETTICOAT CO.
FLORENCE SUPPLY CO. and
B. WEBSTER.

By LEOPOLD M. STERN,
Their Attorney,
Seattle, Washington.

Receipt of a copy and due service herein admitted this 25th day of October, 1909.

McCLURE & McCLURE,
Attorneys for Trustee.
TWOROGER & WINKLER,
Attorneys for Bankrupt.

[Endorsed]: Exceptions to Trustee's Report Setting Off Exemptions. Filed Oct. 25, 1909, 2:00 P. M. John P. Hoyt, Referee.

Filed in the U. S. District Court, Western Dist. of Washington. Dec. 13, 1909. R. M. Hopkins, Clerk.

[Order Modifying and Approving Action of Trustee.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983—IN BANKRUPTCY.

In the Matter of BENJAMIN GERBER,
Bankrupt.

This matter having been heretofore heard upon exceptions filed by certain creditors to the action of the Trustee in setting aside exemptions to the bankrupt, and the undersigned, the Referee in Bankruptcy before whom said hearing was had, being now sufficiently advised in the premises;

It is ordered that the said action of said Trustee be modified in that the amount which was by him set aside in lieu of certain animals in the sum of $250.00

be reduced to the sum of $150.00, and that the amount set aside by him for the maintenance of the bankrupt and his family in the sum of $150.00 be reduced to the sum of $90.00, and that in all other respects his action be and hereby is approved.

Dated at Seattle, in said District, this 8th day of December, 1909.

JOHN P. HOYT,
Referee in Bankruptcy.

[Endorsed]: Order as to Exemptions. Filed Dec. 8, 1909, 1:00 P. M. John P. Hoyt, Referee.

Filed in the U. S. District Court, Western Dist. of Washington. Dec. 13, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983.

In the Matter of BENJAMIN E. GERBER,
Bankrupt.

Petition [to Referee] for Review.

To the Honorable JOHN P. HOYT, Esq., Referee in Bankruptcy:

Your petitioners, Freedman Bros. Company et al., creditors of the above-named bankrupt who have heretofore filed exceptions to the Trustee's report setting off the bankrupt's exemptions, respectfully show that the order made and entered herein by the Referee in Bankruptcy on the 8th day of December, 1909, with respect to said objections, was erroneous,

in that it allowed the bankrupt the sum of one hundred and fifty dollars ($150.00) in lieu of certain animals.

And that said order was erroneous in that it allowed said bankrupt the sum of ninety dollars ($90.00) for provisions for the maintenance of himself and family.

And that said order was and is erroneous in that it overruled the objections of these petitioners to the setting apart to the bankrupt by the Trustee of the homestead exemption claimed by the said bankrupt, and in ordering that said homestead exemption be allowed.

Wherefore your petitioners feeling aggrieved because of such order, pray that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order 27.

Dated Seattle, December 11, 1909.

FREEDMAN BROS. COMPANY et al.
By LEOPOLD M. STERN,
Their Attorney.

[Endorsed]: Petition for Review. Filed Dec. 13, 1909. 9:00 A. M. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 13, 1909. R. M. Hopkins, Clerk.

[Certificate and Return of Referee in Bankruptcy.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983—IN BANKRUPTCY.

In the Matter of BENJAMIN GERBER,

Bankrupt.

Petitions having been filed by the parties in interest for the review of the order made and filed herein on the 8th day of December, 1909, as to the exemptions of the bankrupt, the undersigned the Referee in Bankruptcy before whom said matter is pending and who made said order, does hereby certify and return as follows, to wit:

That as to the lieu exemptions set aside by the Trustee and modified by said order, the facts established upon the hearing were that no claim for specific property in lieu of the animals and supplies was made by or on behalf of the bankrupt, his only claim being for a cash allowance; that the specific property which he might have claimed on account of such lieu exemptions was sold by the Trustee and not more than 60% of its value obtained therefor upon such sale; that in view of these facts the undersigned was of the opinion that the bankrupt should only receive in cash 60% of the amount to which he would have been entitled in specific property had he made claim therefor; that he would have been entitled in lieu of exempt animals to $250.00 worth of

other property, and was therefore entitled to $150.00 only in cash out of the proceeds of the property sold; that as to the exemptions of property necessary for his maintenance, the statute not having provided any amount in lieu thereof there seemed to be no guide to aid in determining how much cash he would be entitled to instead of specific property if he had made claim therefor, but the same reasons would obtain for reducing the cash allowance on this account as for reducing that claimed in lieu of certain animals, and the Referee agreeing with the Trustee that $25.00 per month would have been a fair allowance if taken in property, 60% thereof, or $15.00, per month would be a fair allowance in cash.

For these reasons the undersigned by said order reduced the allowance made by the Trustee, to wit, $250.00 and $150.00 respectively, to $150.00 and $90.00, respectively.

In regard to the action of the Trustee in setting aside the homestead as exempt to the said bankrupt which was sustained by the undersigned, he certifies and returns the facts established before him upon the hearing as follows, to wit:

That on the 15th day of April, 1909, the bankrupt paid a deposit of two hundred dollars on the purchase price of the property now claimed as homestead. That at that time he was wholly insolvent, and knew himself to be insolvent; that many suits were pending, and were threatened by creditors for accounts against the bankrupt long past due. That during the latter part of April, 1909, a petition in involuntary bankruptcy was filed against the bank-

rupt by creditors, which petition was strongly contested by the bankrupt. That during the pendency of such proceeding the bankrupt converted eleven hundred dollars, which he had in his possession, into a bank certificate of deposit payable to the order of Blaine, Tucker & Hyland, his attorneys, and delivered said certificate to said attorneys. That his purpose in placing said money in that shape was to prevent creditors from garnisheeing it.

That on May 18, 1909, the bankrupt's attorneys stipulated with the attorney for the petitioning creditor that the pending bankruptcy proceeding be dismissed; that costs aggregating two hundred and thirty-seven dollars incurred in said proceeding be paid out of the eleven hundred dollars held by Blaine, Tucker & Hyland, and that the balance be paid back to Gerber; that Gerber should consent to be immediately adjudged bankrupt upon a new petition to be filed against him by other attorneys representing other creditors; that an effort was made by the attorney who had filed the first petition to persuade Gerber to be adjudged bankrupt upon the first petition, but the bankrupt insisted upon a dismissal of said first petition and the filing of a new one.

That in pursuance of said stipulation the said first proceeding in bankruptcy was dismissed on the 18th day of May, 1909, and on the 19th day of May, 1909, said Gerber was adjudged bankrupt upon a second petition filed that day. That during the interim between the dismissal of the first petition and the filing of the second petition, said Gerber paid a balance of thirteen hundred dollars cash on the purchase price

of the property receiving a deed therefor. That immediately after receiving said deed he filed a declaration of homestead on said property. That the thirteen hundred dollars cash so paid was made up of the balance received from Blaine, Tucker & Hyland upon the dismissal of the first petition and other moneys held by the bankrupt.

From the foregoing facts the court concludes that the bankrupt invested said funds while insolvent and knowing himself to be insolvent, for the purpose of withholding same from his creditors; that the bankrupt insisted upon a dismissal of the first petition in bankruptcy in order that he might conclude the transaction with respect to the purchase of said property before the filing of the second petition upon which he was adjudged bankrupt.

That in equity and good conscience it would seem that in view of these facts said homestead should not be set aside to the bankrupt as exempt, but under the liberal rule laid down by the Supreme Court of this State said undersigned was constrained to hold that it was, notwithstanding his opinion as to the equities involved in the proposition.

Said undersigned, therefore, transmits herewith the petition to have exemptions set aside, the reports of the trustee thereon, the exceptions filed thereto by certain creditors, said order of December 8, 1909, and said Petitions for Review, as, together with the foregoing Findings of Facts, constituting a sufficient Certificate and Return to enable the Judge of the above-named court to review said order.

Dated at Seattle, in said District, this 13th day of December, 1909.

JOHN P. HOYT,
Referee in Bankruptcy.

[Endorsed]: Certificate and Return. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 13, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983.

In the Matter of BENJAMIN GERBER,
Bankrupt.

Memorandum Decision on Questions as to Exemptions.

Filed Apr. 4, 1910.

Petitions for review of the Referee's decision respecting exemptions claimed by the bankrupt have been filed on behalf of creditors and the bankrupt respectively. After laboriously studying the record, my conclusions are that the order made by the Referee is equitable and the aggregate of the allowances approximate what in my opinion is the legal right of the bankrupt.

I doubt whether the law authorizes the Court to scale down the case allowed in lieu of domestic animals in proportion to the difference between the appraised value and the amount realized from a sale of the bankrupt's property, and I do not wish this

decision to be considered as a precedent for such determination of a bankrupt's rights. An allowance of money in lieu of provisions and fuel was made by the Court in the Buelow Case, 98 Fed. Rep. 86, and I have not since that decision was rendered, entertained any doubt as to its propriety in that case. This case is distinguishable by the fact that objections were made in behalf of creditors to the allowances of cash instead of the specific kind of property which might have been selected, and there appears to be no denial of the assertion made that the bankrupt might have made his selection of property before it was sold, and neglected to do so. This objection, if sustained, would require the Court to cut out the $90.00 allowed by the order of the Referee in lieu of provisions and fuel. If this were done, however, I would change the order so as to allow as much as the statute allows in lieu of domestic animals which the bankrupt did not possess, and in such a modification of the order, there would be a gain to the bankrupt of $10.00.

It is the opinion of the Court that the Referee's ruling with respect to the homestead is in accordance with the law of this state and it must be affirmed.

In consideration of the adroit manner in which the bankrupt eluded his creditors and succeeded in converting cash into a homestead in the interval between the dismissal of the first bankruptcy proceedings and the initiation of this case, the Court does not feel called upon to insist upon technicalities for his further benefit. I think that he has profited

sufficiently by the liberality of the exemption law, and I will confirm the Referee's adjustment.

C. H. HANFORD,
Judge.

[Endorsed]: Memorandum Decision on Questions as to Exemptions. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 4, 1910. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983.

In the Matter of BENJAMIN GERBER,
Bankrupt.

Order Affirming Decision of Referee In re Exemptions.

This cause having heretofore come on to be heard on the petition of certain creditors and the separate petition of the bankrupt for review of the decision of the Referee respecting exemptions claimed by the bankrupt, and said matter having been heretofore argued and submitted to the Court, and the Court having duly considered same, and having made and filed herein Memorandum Decision in said matter;

It is hereby ordered, adjudged and decreed, that the decision of the Referee in the matter of said exemptions be, and the same is hereby sustained, to which ruling the said objecting creditors and the

bankrupt severally except and their exceptions each are allowed.

Done in open court this 11th day of April, 1910.

C. H. HANFORD,
Judge.

[Endorsed]: Order Affirming Decision of Referee in re Exemptions. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 11, 1910. R. M. Hopkins, Clerk.

[Certificate of Clerk U. S. District Court to Record.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3983.

In the Matter of B. GERBER,

Bankrupt.

United States of America,
Western District of Washington,—ss.

I, R. M. Hopkins, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing and attached, to be a full, true and correct copy of Certificate and Return; Exceptions to Trustee's Report, etc.; Memorandum Decision; Trustee's Report of Exempted Property; Order as to Exemptions; Order Affirming Decision; Petition to Set Aside Exemptions; Petition for Review, and Schedule B (5), filed in the within entitled cause, and the original

thereof appears on file in said court at the city of Seattle, Washington, in said District.

Attest my official signature and the seal of the said District Court, at the city of Seattle, Washington, the 17th day of June, A. D. 1910.

[Seal] R. M. HOPKINS,
Clerk.

[Endorsed]: No. 1871. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Benjamin Gerber, Bankrupt. Freedman Bros. Company, Shoninger, Heinsheimer Mfg. Co., Shaff & Barnett, Levett, Crossman & Co., B. Limon, Morris Kashowitz, Classman & North, Gamson & Cohn, Regal Silk Garment Co., Ben J. Schmidt & Co., Edward Isaac & Co., Bauer Bros. & Co., J. J. Pfister Knitting Co., Neubauer Bros., Holm & Nathan, J. Mikola & Bro., Jacob Rapoport, M. Hyman & Co., H. Stern, High Grade Petticoat Co., Florence Supply Co., and B. Webster, Petitioners, vs. Nelson W. Parker, Trustee in Bankruptcy for Benjamin Gerber, Respondent. Transcript of Record. Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of Certain Orders of the United States District Court for the Western District of Washington, Northern Division.

Filed June 21, 1910.

F. D. MONCKTON,
Clerk.

NO. 1871.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of BENJAMIN GERBER, Bankrupt FREEDMAN BROS. COMPANY, SHONINGER, HEINSHEIMER MFG. CO., SHAFF & BARNETT, LEVETT, CROSSMAN & CO., B. LIMON, MORRIS KASHOWITZ, CLASSMAN & NORTH, GAMSON & COHN, REGAL SILK GARMENT CO., BEN J. SCHMIDT & CO., EDWARD ISAAC & CO., BAUER BROS. & CO., J. J. PFISTER KNITTING CO., NEUBAUER BROS., HOLM & NATHAN, J. MIKOLA & BRO., JACOB RAPOPORT, M. HYMAN & CO., H. STERN, HIGH GRADE PETTICOAT CO., FLORENCE SUPPLY CO., and B. WEBSTER,

Petitioners.

vs.

NELSON W. PARKER, Trustee in Bankruptcy for BENJAMIN GERBER,

Respondent.

Brief of Petitioners.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of Certain Orders of the United District Court for the Western District of Washington, Northern Division.

LEOPOLD M. STERN

SEATTLE, WASHINGTON ATTORNEY FOR PETITIONERS

HIRSCHBERG PTG. CO. SEATTLE

NO. 1871.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of BENJAMIN GERBER, Bankrupt FREEDMAN BROS. COMPANY, SHONINGER, HEINSHEIMER MFG. CO., SHAFF & BARNETT, LEVETT, CROSSMAN & CO., B. LIMON, MORRIS KASHOWITZ, CLASSMAN & NORTH, GAMSON & COHN, REGAL SILK GARMENT CO., BEN J. SCHMIDT & CO., EDWARD ISAAC & CO., BAUER BROS. & CO., J. J. PFISTER KNITTING CO., NEUBAUER BROS., HOLM & NATHAN, J. MIKOLA & BRO., JACOB RAPOPORT, M. HYMAN & CO., H. STERN, HIGH GRADE PETTICOAT CO., FLORENCE SUPPLY CO., and B. WEBSTER,

Petitioners.

vs.

NELSON W. PARKER, Trustee in Bankruptcy for BENJAMIN GERBER,

Respondent.

Brief of Petitioners.

Upon Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, of Certain Orders of the United District Court for the Western District of Washington, Northern Division.

LEOPOLD M. STERN

SEATTLE, WASHINGTON ATTORNEY FOR PETITIONERS

STATEMENT OF THE CASE.

One Benjamin Gerber, a retail dealer in ladies' wearing apparel, conducting business at Seattle, was duly adjudged bankrupt on the 19th day of May, 1909, by the District Court of the United States for the Western District of Washington, Northern Division. The assets which came into the hands of the trustee consisted entirely of personal property, all of which was sold in due course at a price not exceeding 60 per cent. of its original value.

The schedule of assets and liabilities was filed in the clerk's office by the bankrupt on May 27th, 1909, which was some time before the election of a trustee. In compliance with the Bankruptcy Act, which requires the bankrupt to include in his schedules "a particular statement of the property claimed as exempt, etc.," Gerber, in Schedule B (5), listed wearing apparel for himself and family and also certain specified household goods and effects. These items had remained in the possession of the bankrupt after his adjudication and the appointment of a trustee, and no controversy ever arose thereover.

In addition, the bankrupt, in Schedule B (5) claimed the sum of $250 cash in lieu of the exemption allowed in subdivision 4 of Section 841 of Pierce's Code of the State of Washington; also, under the authority of the same statute "a sufficient sum out of

the assets for provision for himself and his family for a period of six months." The bankrupt also claimed certain real property as a homestead.

On July 8th, 1909, the bankrupt filed with the referee having the case in charge, a petition which merely reiterated his claim of exemption as set forth in Schedule B (5), and prayed the court to order the trustee to set the same aside to him. In response to this petition the trustee, under date of October 12th, 1909, filed with the referee a report of exempted property, which report designated and set apart to the bankrupt everything claimed by him, and which included the following items:

The wearing apparel and household furniture; $250 in money, under subdivision 4 of Sec. 5248 of Ballinger's Code, in lieu of cows, swine, bees and fowls; the sum of $25 per month, aggregating $150, for the maintenance of the bankrupt and his family for six months, making a total lieu exemption under said subdivision 4 of $400 money; also the real property claimed as homestead.

Within twenty days after the filing of the trustee's report of exemptions, some twenty-two creditors joined in filing exceptions thereto, these exceptions being directed only to the allowance of the cash exemptions and the homestead. With respect to the cash exemptions, the exceptions were grounded upon

the contention that at the time the bankrupt filed his schedules, the property was still *in specie,* and the bankrupt had ample opportunity to make his selections from existing property; that he had no right to claim money in lieu of goods, and that by failing to make his selection at the time, and in the manner provided by law, he had waived his exemption. As to the cash allowance for the maintenance of the bankrupt and his family for six months, it was contended by the creditors that the statutes of the State of Washington do not authorize any exemptions in lieu of provisions and fuel, either in money or property. The homestead allowance was excepted to on the ground that he had acquired the homestead on the eve of bankruptcy, and in contemplation of his immediate adjudication as a bankrupt, and in pursuance of a scheme to work a fraud and wrong upon his creditors.

Upon a hearing of the issues thus formed, the referee modified the report of the trustee to the extent of reducing the allowance to $250 in lieu of animals, etc., to $150, and the allowance of $150, made for the maintenance of the bankrupt and his family, to $90. In other respects, the action of the trustees was approved. These reductions were made upon the theory that the bankrupt, having had the opportunity, and yet neglected to make his selection from specific property, had not wholly forfeited his rights, but that the

specific property he might have claimed on account of lieu exemptions, having sold for 60 per cent. of its value, the bankrupt should receive only 60 per cent. in cash of the amount he would have been entitled to in specific property, had he made claim therefor.

Upon the petition of the excepting creditors, the ruling of the referee, together with his findings of fact and conclusions of law, were certified to the district judge for review, who thereupon rendered an opinion confirming the referee's adjustment. A formal order to that effect was thereafter entered by the district judge, to which the excepting creditors preserved proper exceptions.

The excepting creditors have now brought the proceeding and order above described to this court for revision.

SPECIFICATION OF ERRORS RELIED UPON.

1. The court below erred in allowing the bankrupt $150 exemption in cash in lieu of those certain animals exempt to a debtor, under the laws of the State of Washington.

2. The court below erred in allowing the bankrupt $90 exemptions in cash in lieu provisions and fuel, exempt to a debtor, under the laws of the State of Washington.

3. The court below erred in allowing the bankrupt's claim of homestead.

BRIEF OF THE ARGUMENT.

The bankrupt, having failed to claim his exemption in specific articles, in lieu of animals, at the time he filed his schedules, thereby waived his exemptions.

Section 6 of the Bankruptcy Act adopts for the purpose of bankruptcy proceedings the exemptions allowed by the laws of the several states. While the state statutes control as to the amount and kind of exemptions, and as to the persons entitled thereto, the time and manner of claiming exemptions, and of setting them apart and allowing them, are regulated by the Bankruptcy Act.

In re Kane (C. C. A., 7th Cir.), 127 Fed. 552, 11 Am. B. R. 533;

In re Friedrich (C. C. A., 7th Cir.), 100 Fed. 284, 3 Am. B. R. 801;

In re Le Vay, 125 Fed. 990, 11 Am. B. R. 114;

In re Stein, 130 Fed. 629, 12 Am. B. R. 384;

Matter of McClintock, 13 Am. B. R. 601;

In re Groves, 6 Am. B. R. 728.

It may also be laid down as a general proposition that certain duties and burdens rest upon the party claiming an exemption, and he will be required to show, affirmatively, that he is entitled to any exemption claimed by him.

McGahan v. Anderson (C. C. A., 4th Cir.), 113 Fed. 115, 7 Am. B. R. 641;

In re Monroe & Co., 156 Fed. 216, 19 Am. B. R. 255;

In re Turnbull, 106 Fed. 667, 5 Am. B. R. 549;

In re Campbell, 124 Fed. 417, 10 Am. B. R. 723.

The state statute, under which the bankrupt in the case claimed his cash exemption, in lieu of specific personal property, is as follows (in the Record, it is sometimes quoted from Pierce's Code and sometimes from Ballinger's Code) Rem. & Bal. Code, Section 563, Sub-division 4:

"To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value."

It will be observed that under this statute the debtor, if he does not possess the animals described, *may select from his property and retain other property not to exceed two hundred and fifty dollars in value.* In other words, the selection, in lieu of the animals, must be made from other specific property belonging to the debtor.

Now, what are the requirements of the Bankruptcy Act, and what is procedure defined by the Supreme Court, relative to the time and manner of

claiming exempt property, and the setting apart by the trustee, of the exemptions claimed?

Section 7 (8) of the act directs the bankrupt to prepare, make oath to, and file in court within ten days after the adjudication, a schedule of his property, showing amount, kind and location, and value in detail, "and a claim for such exemptions as he may be entitled to."

No. 38 of the General Orders in Bankruptcy, adopted by the Supreme Court, provides "that the several forms annexed to these general orders shall be observed and used."

The official forms in bankruptcy prescribed by the Supreme Court, provides for the following statement to be included in the schedules:

"**Schedule B. (5)**

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

	Valuation.	
	$	Cts.
Military uniform, arms, and equipments		
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption		
Total.....		

.....Petitioner."

General Order 17, which defines the duties of the trustee, among other things, requires him to "make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report."

Section 47 of the act, referred to in the general order just quoted, also defines the duties of the trustees, which duties include the direction to (11) "set apart the bankrupt's exceptions, and report the items and estimated value thereof to the court as soon as practicable after their appointment."

And Form 47 prepared by the Supreme Court is as follows:

"**Trustee's Report of Exempted Property.**

In the District Court of the United States for the ..... *District of* .....

In the matter of ....., Bankrupt.

In Bankruptcy.

At ....., on the ..... day....., 19.....

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of congress relating to bankruptcy.

General Head.	Particular Description.	Value.
Military uniforms, arms and equipments		
Property exempted by State laws		

.....Trustee."

From all of which it is clear that both the letter and the spirit of the Bankruptcy Act require the bankrupt to assert his claim to his exemption, in writing, duly sworn to, and filed with his schedules. *The claimant must specify each article in detail,* together with its location and estimated value. There must be a selection of particular items, described aptly enough to enable the trustee to identify and set apart precisely the articles claimed as exempt. As said by Remington on Bankruptcy, Sec. 1055, "Thus it is not sufficient simply to claim that property to the 'amount of' a certain named sum should be set off to him; the exact property which he elects to take should be specified."

Tested by this rule, it is obvious that the bankrupt did not assert his claim to exemptions in the manner and form required by law. At the time he filed his schedules, which included his claim of exemptions, the estate of the bankrupt consisted of a stock of merchandise which was then under the control of the Bankruptcy Court, and which was subsequently sold by the trustee at 60 per cent. of its value (Record 21). It is conceded that there were no animals, and that the bankrupt therefore had the right to select his lieu exemptions to the value of $250. In the language of the statute heretofore cited, he had the right to "select and retain *other property,* not to exceed two hundred and fifty dollars coin in value." The property in the control of the court was

in specie. The bankrupt had ample opportunity to make his selection from merchandise. Instead, he demanded cash to the amount of $250 in lieu of animals, and cash in lieu of provisions, although no money had been turned over to the jurisdiction of the court by the bankrupt. Later on, when the property had been converted into money, he repeated his demand for cash exemptions from the funds in the hands of the trustee, which had been realized from the sale of the personal property (Record 11). These claims the court below allowed to the extent of 60 per cent., that being the percentage of the face value which the merchandise turned over to the bankrupt sold for.

We contend that the bankrupt, having had the opportunity, and having neglected to claim his lieu exemptions in specific property, has lost the right to lieu exemptions in cash, even to the extent of the percentage of the face value realized from the sale of the specific property.

Turning first to the decisions of the Supreme Court of the State of Washington, we find the case of *Carter vs. Davis,* 6 Wash. 32; 33 Pac. 833, which seems to us strongly in point. In that case, certain live stock had been levied upon by the sheriff. A portion of these animals were claimed and received by the debtor before the sale. The balance was sold

by the sheriff for more than $250. The statute allows as exempt to each householder beds and bedding, "and other household goods and utensils, and furniture not exceeding $500 coin, in value." The debtor in the case cited selected her "bed and bedding," and certain other household goods, utensils and furniture not exceeding $150 in value, although the statute allowed her a limit of $500. In lieu of the additional selections she might have made from her household goods, utensils and furniture, to bring the total to $500, the debtor demanded of the sheriff $250, the proceeds of the sale of the live stock above mentioned.

The Supreme Court, in its opinion, says: "The claim to this two hundred and fifty dollars, in the hands of the sheriff, is manifestly unfounded in law. The section of the statute referred to authorizes the selection of 'other household goods, utensils and furniture,' and prescribes the method and by whom such property may be selected, *but confers no right to retain and select other property of a different character, in lieu of that authorized to be selected and retained.*"

The case of *U. S. Fid., etc., Co. vs. Hollenshead,* 51 Wash. 326, also supports our contention that the bankrupt waived his claim of lieu exemptions by his failure to claim specific property in his schedules. In that case the guaranty company had sued Hollenshead, also garnisheeing his bank account at the same time. The suit was contested, and after a trial on the merits, judgment was rendered against the de-

fendant and against the garnishee for $589.71. A period of three days elapsed before the announcement of the judgments and the formal entry thereof. In the interim the defendant made and filed a claim for exemptions, setting forth that he was a householder, and claiming, besides his household furniture, $250 in lieu of cows, calves, etc., out of the moneys in the hands of the garnishee. The garnishee paid the money into the registry of the court, and thereafter the court, upon motion, ordered the entire sum paid over to the plaintiff in satisfaction of its judgment.

The Supreme Court, after reciting the facts, substantially as we have stated them, says: "Upon these proceedings defendant predicates error, and insists that, under the liberal rules adopted by this court in construing exemption statutes, the money should be paid over to him as exempt. However, we believe that the rule relied upon by appellant cannot be invoked until a claim has been made at the proper time and in a proper manner.

"The law is solicitous for the welfare of the debtor, but it also recognizes the rights of the creditor to fully satisfy his judgment out of the property of the debtor that is not exempt from execution. The right to claim property in lieu of other property specifically exempted by statute is a privilege, and will be waived unless asserted at the time and in the manner expressly or impliedly required by the law. 12 Am. & Eng. Ency. Law (2nd Ed.) 198."

The decision of the lower court was affirmed.

The question under discussion has arisen many times in the bankruptcy courts of the different jurisdictions, and the decisions have been uniformly in support of the proposition contended for by us. Particularly in Pennsylvania has the subject received much consideration, the statute with reference to the selection by the debtor of merchandise of a specific value being apparently similar to the exemption law of Washington.

The case of *In re Von Kerm,* 135 Fed. Rep. 447, 14 Am. B. R. 403, presents a parallel case on the facts, and the entire opinion is as follows:

"HOLLAND, District Judge. A voluntary petition in bankruptcy was filed in this case on the 1st day of July, 1904, in which the alleged bankrupt claimed his exemption, under the laws of the State of Pennsylvania, in the following form: 'Fixtures and wearing apparel under and by virtue of the act of April 9th, 1849, $300.' This notice was inserted in Schedule B5 in the bankrupt's petition for exemption. Nothing more was done by him in the way of specifying the articles he intended to claim until November 9th, 1904, twenty-nine days after a sale of all his property by the trustee, which took place on October 11, 1904. He then filed a petition before the referee, asking that his claim for exemption might be amended *nunc pro tunc* by adding a specified list of articles claimed. The prayer of the petitioner was refused by the referee.

"While a notice in general language, both in a voluntary and involuntary petition, of an intention

to claim the exemption may be amended, if done in time, *In re Duffy* (D. C.), 118 Fed. 926, yet, where the notice in either case is so general as not to indicate to the trustee what specific articles the bankrupt claims as his exemption, and the bankrupt files no schedule and makes no request upon the trustee to set aside specific articles of exemption until after the sale, he must be regarded as having waived his right of exemption, and he cannot claim $300 out of the proceeds of sale. *In re Otto L. Wunder* (D. C.), 133 Fed. 821; *Prince & Walter* (D. C.), 131 Fed. 546; *In re Manning* (D. C.), 112 Fed. 948; *In re Haskin,* 6 Am. Bankr. Rep. 485, 109 Fed. 789.

The order of the referee denying the prayer of the petitioner is approved."

In the case of *In re Manning,* 112 Fed. Rep. 498, 7 Am. B. R. 571, the bankrupt claimed, as in the case at bar, household goods and cash from the proceeds of the sale of personal property in the hands of the trustee. The trustee set apart the exemptions as claimed, and objections to his report were filed by creditors. The District Court sustained the objections, holding that there was no provision in the exemption law of Pennsylvania that permitted a debtor to claim money out of the future proceeds of the sale of personalty. After quoting General Order 17 in full, Judge McPherson goes on to say:

"The order requires that each article shall have an estimated value placed upon it, and thus requires a specification of items and a separate appraisal. This explicit direction cannot be neglected. It follows, I think, that the attempted setting aside of the bankrupt's exemption was a nullity, and that the trustee should have been surcharged with this amount."

In re Prince & Walter, 131 Fed. Rept. 546, 12 Am. B. R. 675, a contest arose over the distribution of funds realized by the trustee from the sale of personal property. Among these items reported by the trustee was one of $300 paid in cash to the bankrupts as their state exemption. The court, in its opinion, says:

"But there was unfortunately no authority for this payment, so far, at least, as any one now before the court is concerned, and it is difficult to see how the trustee was led into making it. As partners, the bankrupts had no right to an exemption out of partnership proerty. *Bonsall v. Comly,* 44 Pa. 442; *Clegg v. Houston,* 1 Phila. 352. And even if this were not so, they were bound to designate specific articles, and were not entitled to come in on the proceeds after they had been sold. *Hammer v. Freese,* 19 Pa. 255. Moreover, it was their duty to make this designation at the time of filing their schedules, and to have the property set off to them by the trustee, who was required to report the items, with their estimated value, to the court for its approval. Bankruptcy Act. Sec. 7a (8); *Id.,* Sec. 47a (11). *In re Duffy,* 9 Am. B. R. 358, 118 Fed. 926; *In re Le Vay,* 11 Am. B. R. 114, 125 Fed. 990. The assent of creditors, who are said to have unanimously agreed at one of the meetings before the referee that the bankrupts should receive their exemption in cash, could not dispense with these formalities, or give the bankrupts that to which they were not legally entitled. *In re Grimes,* 2 Am. B. R. 730, 96 Fed. 529."

In re Duffy, 118 Fed. Rep. 926, 9 Am. B. R. 358, the court said:

"The referee was clearly right in holding that the particular property which the bankrupt desired

to retain under his state exemption must be set out in his schedules. It was not sufficient to simply claim that property to that extent should be set off to him; the exact property which he elected to take should have been specified. This is what is required by the state law *(Hammer v. Freese,* 19 Pa. 255), and the Bankruptcy Law is governed by it. Besides that, the schedules prescribed by the Supreme Court call for a particular description of the property claimed, which of itself is controlling. Bankruptcy forms, schedule B (5)."

Ie re Le Vay, 125 Fed. 990, 11 Am. B. R. 114, the court said:

"It is held by the courts of Pennsylvania that an execution debtor is not entitled to his $300 exemption out of the proceeds of the sale of personal property by the sheriff, but that he must elect the goods he wishes to retain and have them appraised and set aside to him."

To the same effect as above are the following cases:

In re Staunton, 117 Fed. 507, 9 Am. B. R. 79 (Penn.);

In re Haskins, 109 Fed. 789, 6 Am. B. R. 436 (Penn.);

In re Wunder, 133 Fed. 821, 13 Am. B. R. 701 (Penn.);

In re Blanchard, 161 Fed. 793, 20 Am. B. R. 417 (N. C.);

In re Falconer, 110 Fed. Rept. 111, 6 Am. B. R. 557 (Ci. Ct. App., 8th Cir.) (See dissenting opinion);

In re Pfeiffer, 155 Fed. 892, 19 Am. B. R. 230 (Penn.);

In re Ogilvie, 5 Am. B. R. 374 (Ga.);

In re Woodward, 95 Fed. 955, 2 Am. B. R. 692 (N. C.);

In re Stein, 130 Fed. 629, 12 Am. B. R. 384 (Pa.).

We desire to call particular attention to the case of *In re McClintock,* 13 Am. B. R. 606. The opinion in this case was rendered by a referee in Ohio, and the decision was affirmed by the district judge. There is a striking similarity between the facts in that case and the case at bar. The statute in Ohio is very much like that of Washington with respect to the selection of lieu exemptions. In that case, the bankrupt made his claims in schedule B (5) in just about the same manner as the bankrupt in this instance. The trustee sold the property, and the bankrupt then filed a petition for lieu exemption in cash, claiming the amount at which the specific items had been sold by the trustee. The referee, in a very able and well-considered opinion, held that the bankrupt's claim must be denied, he having waived his rights by his neglect to claim specific articles at the time of filing his schedules.

To the same effect is also the opinion of Referee Remington (Ohio) *In re Groves,* 6 Am. B. R. 728, afterwards affirmed by the district judge. Mr. Remington is the author of Remington on Bankruptcy.

The case of *Moran vs. King*, 111 Fed. 730, 7 Am. B. R. 176 (Cir. Ct. App., 4th Cir.), in effect holds that, as a rule, if a person who is entitled to exemption, and is under no disability to assert his claim, fails to do so in the time and manner provided by law in any action or proceeding involving his right, he will be deemed to have waived his exemption.

In conclusion, we submit it must be held that the bankrupt did not assert his claim to exemption in lieu of animals, etc., in the time and manner provided by the bankruptcy law. This was not the result of ignorance, accident, or mistake. The bankrupt might have asked leave to amend his claim before the sale, and while the property still existed in specie. He neglected to do so, and must be held to have waived his claim.

Circumstances may arise where it is impossible for the bankrupt to designate in his schedules specific articles as exempt. And where this is so through no neglect of the bankrupt, it will be sufficient for him to state his claim as definitely as the circumstances of the particular case will permit. For example, where exempt property has been sold by a receiver prior to the qualification of the trustee, and before the time for filing schedules had expired, the bankrupt may make claim to the proceeds of the property sold. But these were not the circumstances in this case.

The law on the subject is well summed up by Remington on Bankruptcy, Vol. 1, page 312, Section 491, as follows:

"The claim for exemption must describe with particularity the precise articles and property claimed as exempt. It will not do simply to say 'the bankrupt is a married man,' etc., etc., 'resident of New York,' etc., etc., 'and claims under section so and so of the statutes $500 in lieu of a homestead,' when perhaps there is no cash money in the estate at all, but only unsold merchandise. In other words, the identical property in the form in which it existed at the date of adjudication, or, at any rate, at the date when the schedules are presumed to be filed, must be described as the property claimed as exempt; thus, if there be cash money at that time, then it may be claimed as money; if there be none, then $500 worth of goods or accounts, or other property, may be claimed—in goods, in accounts, and in other property. It will not do to claim money unless there was money at the time; the property actually in existence at that time to the value of the exemption allowed in lieu of homestead, however, may be claimed, and must be so described, that the trustee may be able to set it off at once to the bankrupt, and separate it from the assets belonging to the creditors."

Also in Section 1054 the same author says:

"Claiming Money When No Actual Money, but Only Goods in Estate.—Thus, if there was no actual money in the estate at the date of adjudication, it would not be proper to claim $500 in lieu of a homestead, for the simple reason that there were 'no dollars' then to be set apart to the bankrupt. 'Goods' are not 'dollars,' although they may be convertible into dollars; therefore, when the bankrupt is trying to describe what is his property as distinct from what is his creditors, he should be required to describe

existing property—'goods,' if it be goods; 'dollars,' if it be dollars."

Also in Section 1057, the same author goes on to say:

"CLAIMING 'PROCEEDS,' WHERE PROPERTY STILL IN SPECIE.—Thus a claim of 'proceeds' of certain specified property is improper, the property still being in specie."

The exemption statute of the State of Washington does not authorize the allowance to the bankrupt of any exemption in lieu of provisions and fuel.

Under this heading we desire to argue the proposition that the court below erred in allowing the bankrupt ninety dollars in cash in lieu of six months provisions and fuel awarded to a debtor under Sec. 563, Par. 4, Rem. & Bal. Code. While exemption laws are to be construed liberally, the courts cannot add to the provisions of the law. The intention of the legislature must always govern, and the courts should not strain the law beyond its fair and just meaning. In allowing the bankrupt cash in lieu of six months fuel and provisions the court below exceeded its powers, and granted larger and different exemptions than those given by the statute.

The Washington statute under consideration authorizes the debtor to select certain animals, bees, and fowls, also six months provisions and fuel for the maintenance of the householder and his family;

also feed for such animals for six months. The law then goes on to make the following, and *no other*, proviso for lieu exemptions:

"Provided, that in case such householder shall not possess, or shall not desire to retain, the animals named above, he may select from his property and retain other property not to exceed two hundred and fifty ($250.00) coin in value."

The proviso is plain enough. If the debtor does not possess the *animals* named in the statute, he may have lieu exemptions out of other property. If, however, he is unfortunate enough not to have provisions and fuel from which he can make a selection, or if he has not feed for his animals sufficient to last six months, the statute affords him absolutely no relief in the way of lieu exemptions.

Yet, the court below, despite the significant silence of the statute on this subject, in accordance with its early ruling which has been followed in all bankruptcy causes in this District, allowed the bankrupt to select and receive a certain amount in cash because he never possessed any specific provisions and fuel from which he could make his selection. If it be held that the court acted within the law in making this allowance, then with equal force may it be contended that the bankrupt has the right to have cash in lieu of the six months feed for animals which the statute allows, and which he may not possess.

Again, paragraph 3 of the exemption section under consideration, allows to each householder certain bed and bedding and other household goods and utensils and furniture, not exceeding $500 coin in value. The statute makes no provision for lieu exemptions in the event the "household goods, utensils, and furniture" of the debtor fall below five hundred dollars in value. Why may not the court, with equal authority, allow the debtor to make up the difference by selecting property of a different character?

It is our contention that the plain intention of the legislature was to allow the debtor lieu exemptions only in the event he did not possess or desire to retain the specific animals mentioned by the statute. An express exception is made in the case of animals, but no provision is made for lieu exemptions in the event the debtor did not possess provisions or fuel for himself and family, or six months feed for animals. The whole matter is treated in one paragraph of the section, and the express exception, with respect to exemptions in lieu of animals and the silence of the statute with respect to provisions, fuel, and feed, is tantamount to an express declaration by the legislature that the debtor was not to have a similar right in the event he did not possess specific provisions, fuel, or feed, from which to make a selection.

The Washington Supreme Court has never passed squarely on this subject, but it seems to us that the rule, announced in *Carter vs. Davis,* 6 Wash. 327, 33 Pac. 833, heretofore quoted in this brief, must likewise govern the construction to be given the paragraph under discussion. In that case, it will be remembered, the debtor did not possess household goods of value greater than one hundred and fifty dollars, and so, after claiming these as exempt, attempted to make up the difference by claiming money in the hands of the sheriff, the proceeds of the sale of live stock. The Supreme Court denied this right on the ground that the statute conferred "no right to retain or select other property of a different character, in lieu of that authorized to be selected and retained."

The same principle is announced in Vol. 12, Am. & Eng. Encyc. of Law (2d Ed.), page 146, as follows:

"If a statute exempts a particular kind of property or specific articles only, the right of exemption does not extend to any other kind of property, or to any other articles."

Again, Cyc. 18, page 1381, discussing the liberal construction to be accorded exemption statutes, says:

"Although the courts are willing to go to extremes, and it sometimes seems, to unwarranted lengths in this policy of liberal construction, they have balked at 'construing' a statute so as to extend the right of exemption in one particular specific article to another and different article."

The author proceeds to cite *Carty vs. Drew*, 46 Vt. 346, 347. Also *Denkin vs. Crunden-Martin Woodenware Co.*, 91 Mo. App. 209, in support of his text.

To sum up, we maintain that the exemption right being a creature of statute, the intention of the legislature must be discovered and carried out. The intention of the legislature of the State of Washington was to permit a debtor lieu exemptions *in place of animals only.* Its intention was also to allow him to select provisions and fuel for six months maintenance of himself and family, if he possessed the specific items from which to make his selection. If he did not possess these items, then, in the language of the Supreme Court of Washington, in *Carter vs. Davis, supra,* the statute conferred upon him "no right to retain or select other property of a different character in lieu of that authorized to be selected and retained."

Also upon the grounds laid down in support of the first proposition of law argued in the brief, we contend that no allowance should be made to the bankrupt for provisions and fuel. If the specific articles existed, he should have made his claim to these items in specie, in his schedule. If there were no provisions and fuel from which he could have made selection, he should have made that plain, and in his schedule, claimed his lieu exemptions from other property

turned over to the bankruptcy court by him. Having failed to do this, even if it be held that he is entitled to lieu exemptions, he forfeited that right by his neglect to comply with the requirements of the Act relating to the time and manner of selection.

In view of the circumstances under which the bankrupt acquired his homestead, the court should not have set the same apart, but should have held that the bankrupt had forfeited his right thereto.

The petitioners herein excepted to the setting apart to the bankrupt of the homestead claimed by him for the reason "that the said bankrupt upon the eve of bankruptcy while insolvent, and with full knowledge of his insolvent condition and while contemplating and arranging for his adjudication in bankruptcy in the above-entitled cause, purchased said estate with money which was not exempt, and which was derived from the sale of merchandise in the business carried on by said bankrupt, which business immediately thereafter came within the possession and control of the bankruptcy court; that such purchase was made for the purpose of defrauding the creditors of said bankrupt, and for the purpose of withholding moneys used for said purchase, from his creditors." (Record 16.)

Upon the hearing of the issues raised by these exceptions, the referee fully sustained the charges of

fraud preferred by the excepting creditors, but nevertheless held that he was bound under the law to allow the claim of homestead. The findings of fact made by the referee, together with his conclusion of law, appear fully in his certificate and Return made to the District Judge, upon the review of his order. (Record, pages 21, 22, 23, 24.) No exceptions to these findings of fact were over preserved by the bankrupt. They must therefore be taken as correct and true, and must form the basis of such judgment as the Court deems right upon the state facts presented in this Record.

Upon the facts, then, it appears conclusively that the bankrupt knew himself to be hopelessly insolvent immediately preceding the acquiring of the homestead; that, despite this knowledge, he bitterly resisted all efforts of his creditors to force the business into liquidation; that during the pendency of an involuntary proceeding in bankruptcy commenced against him, he accumulated and concealed some eleven hundred dollars, the proceeds of sales in his business; that he expressed his willingness to be adjudged bankrupt, but only upon condition that the pending petition be dismissed, and a new petition be filed against him immediately thereafter; that he absolutely refused to consent to be adjudged bankrupt on the first petition; that such proceedings were had, that the first petition was dismissed, and a second

petition filed the day after, upon which latter petition Gerber consented to an adjudication; that, in the interval between the dismissal of the first petition and the filing of the second petition, Gerber completed the purchase of the property afterwards claimed by him as homestead; that his purpose in insisting upon a dismissal of the first petition was to afford the bankrupt the opportunity to purchase the property before the filing of the petition upon which he was adjudged bankrupt.

Both the Referee and the District Judge were impressed with the magnitude of the fraud in fact, committed by this bankrupt in the acquisition of his homestead, but were constrained by their view of the law to hold that the Bankrupt was nevertheless entitled to have his claim allowed. We contend that they erred in their view, and that, on the contrary, the authorities are uniform in holding that the exemption law cannot be employed as an agency of fraud by a debtor on the eve of bankruptcy.

A strong case in support of our position is that of *McGahan vs. Anderson*, decided by the United States Circuit Court of Appeals for the Fourth Circuit and reported in 113 Fed. Rep. 115, 7 Am. B. R. 641. In that case, as in the case at bar, the Referee and the District Judge, had both overruled the creditors' exceptions to the action of the trustee in

setting apart the bankrupt's homestead; upon appeal, the Circuit Court of Appeals reversed the District Court in its ruling, pertaining to the homestead, and held that the bankrupt was not entitled under the evidence, to the homestead exemption of the house and lot claimed by him. The Court, in the course of its opinion, said:

"As to the homestead exemption, the evidence of the bankrupt is by no means satisfactory. He admits that he began the erection of the 'house in July or August, 1899,—after July 1st.' He does not make a candid disclosure as to where the money came from to build the house, but, when pressed, admitted that a part of it 'came from the sale of goods which he had not paid for.' He fails to disclose how much money came from the goods which he had purchased and never paid for. He alone was possessed of the information upon the subject. It was his duty in setting up a claim to a homestead, to show by clear and conclusive proof that at the time he built the house upon the property he was in a solvent condition, and able to satisfy all the claims against him, before he could take money from his business for the purpose of securing a homestead. The fair deduction from all the evidence in this case tends clearly to prove that at the time he commenced the erection of this house, he was in a failing condition, if not insolvent. He built this house upon a lot owned by his wife, and afterwards had it conveyed to himself in order that he might have it set apart as a homestead. This is a most potential fact to show that he was shaping his course to protect himself as far as possible from the consequence of bankruptcy which the evidence tends to show was imminent at that time, for on the 25th day of October following, a petition of involuntary bankruptcy was filed against him, and in less than a month he was adjudicated a bankrupt. We deem it

unnecessary to discuss the evidence in detail filed in this case, but content ourselves with the conclusions that we have reached based upon all the evidence, more particularly on the evidence of the bankrupt himself.

In the view that we take of this case, we reach the conclusion that the bankrupt court has the power to dispose of this question upon the issue raised by the pleadings and the evidence as they exist in this record, and that upon the evidence and pleadings, the bankrupt has no right to have the property that he claims as a homestead set aside, for the reason that we are of the opinion that he had no money that he could justly call his own at the time when he commenced to erect the building upon the lot of his wife, which was subsequently conveyed to him, as we think, for the purpose of claiming it as a homestead."

The case of *In re Mayer* (C. C. A. 7th Cir.) 108 Fed. 399, also seems to us very much in point on the law. That case involved the authority of the Bankruptcy Court to investigate and determine the right of the bankrupt to the homestead claimed by him and its jurisdiction to declare that the Bankrupt had forfeited his homestead rights by his fraudulent practice in its acquisition. The Court said:

"His absence could not deprive the court of the power to proceed to a final conclusion; though the fact and circumstance of his going, and his family following him abroad, afforded potent evidence that his claim for a homestead in any part of the property other than the frame dwelling, in which he had lived until shortly before the adjudication, was fraudulent in its origin; and that whatever such right he had had in the frame dwelling, he had forfeited by his fraudulent attempt, in anticipation of bankruptcy to obtain

a larger holding. His attempt to include the frame dwelling in the homestead, the district judge declared 'rapacious.' His attitude and conduct as finally revealed were consciously fraudulent and lawless. If not strictly an equity court, a bankruptcy court proceeds on equitable principals, and is not bound to lend itself to the establishment of an undetermined claim for exemption, even though asserted in the sacred name of homestead, in favor of á fraudulent claimant, who stands in confessed defiance of the court and of the law under which the claim is asserted. 'The homestead,' said Judge Bond, in *re Dillard,* 7 Fed. cas. 703, 'was a bounty to unfortunate but honest debtors. It was not intended for the benefit of fraudulent bankrupts.' 'A party,' said Judge Miller, in *Pratt v. Burr, supra,* 'can not turn that which is granted him for the comfort of himself and family into an instrument of fraud.' "

Somewhat in point also is the case of *In re Evans & Co.,* 158 Fed. 153, 19 AM. B. R. 752. In that case, it appeared that the exemption law of Delaware exempted to a debtor all the wearing apparel of himself and his family. It would seem that, in anticipation of bankruptcy, the debtor in that case, had purchased and afterwards claimed as exempt, wearing apparel excessive in amount and value. Objections having been filed to the allowance of the bankrupt's claim, the District Judge, in the course of his opinion, said:

"If the wearing apparel claimed as exempt be so excessive in amount or value as, due regard being had to the circumstances of the particular case, including condition and style of living, to create a conviction that the demand is made for the purpose of defrauding creditors, such claim will be disallowed in whole or in part by reason of the fraud. Nor is it to be tolerated

that one should invest inordinately large sums of money in wearing apparel with an intent to hinder and defraud his creditors, and effectuate his wrongful purpose by resorting to the expedient of wearing, or intending to wear it, in whole or in part. * * * In case of fraud on the part of debtor toward his creditors with respect to wearing apparel, the claim of exemption on a proper showing may be disallowed in whole or in part."

In the case of *Long Brothers v. Murphy*, 27 Kan. 375, the court said:

"But the homestead claim set up by the husband in the land will not avail him in this proceeding. We do not think that a debtor being absolutely insolvent, and having his creditors pressing him for payment of their claims, and fully cognizant of his inability to pay such debts, can, to defraud his creditors, transfer possession of goods purchased by him upon credit, and take in exchange therefor land, either in his own name or in the name of his wife, and then claim the same as exempt as a homestead against such existing creditors. A party cannot turn that which is granted him for the comfort of himself and family, into an instrument of fraud." (*Pratt v. Burr*, 5 Biss. 36; *Thompson on Homesteads*, Par. 305-310.)

The case of *In re Boothroyd & Gibbs*, Fed. case No. 1652, is one arising under the old Bankruptcy Law. The facts in that case are very similar to those in this case. The Court said:

"The purchase by an insolvent trader of a homestead upon the eve of bankruptcy, with knowledge of his insolvent condition, and for the purpose of placing the property beyond the reach of process is a legal fraud, which no court should hesitate to hold void as to creditors. The magnitude of such a fraud would

be more apparent in States where the law exempts a farm or lot of land wholly irrespective of its value, and where a party might, on the eve of bankruptcy, invest a large fortune in a homestead; but the principle is the same everywhere."

Numerous cases arising under former Bankruptcy Acts can be found in support of our position, among others being the following:

In re Boston, 98 Fed. 587.
In re Wright, Fed. cas. 18067.
In re Lammer, Fed. cas. 8031.
In re Santhoff, Fed. cas. 12380.
In re Taylor, 114 Fed. 607.
In re Parker, Fed. cas. 10724.
Also, *Pratt v. Burr,* Fed. case, 11372.
Breckett v. Watkins. 21 Wend. 68.

If Gerber had been adjudged bankrupt on the first petition the eleven hundred dollars which he had concealed, would certainly have passed to the trustee for the benefit of the creditors of the estate, free from any claim of exemption on the part of the bankrupt.

Can it be contended that the scheme of the bankrupt in converting this cash into a homestead during the twenty-four hours elapsing between the dismissal of the first petition and the initiation of the pending case, must receive the sanction of the Court? Here is as bold a case of fraud and trickery as can be found in any bankruptcy reports. The eleven hundred dol-

lars in the possession of the bankrupt during the pendency of the first petition belonged to the creditors. It belonged to them after the dismissal, and the bankrupt had no right to take their money and convert it into property for the express purpose of claiming it as a homestead in a bankruptcy proceeding he had already consented to, at the time he arranged for the conversion of the fund.

This court will look at the substance of the transaction, and not at the shadow. The first petition, the dismissal thereof, the filing of the second petition, was in fact one proceeding, and any disposition of the fund for the purpose of withholding it from the creditors, whether consummated during the pendency of the first or second petition, or during the interval between the two, must be held fraudulent and void.

As intimated in one of the cases we have cited, the bankruptcy court proceeds on equitable principles, and it will not lend itself to the establishment of an unjust claim for exemption, even though asserted in the sacred name of homestead, in favor of a fraudulent claimant who stands in confessed contempt and defiance of the court and of the law under which the claim is asserted.

For the various reasons heretofore mentioned, we respectfully contend that the judgment of the court below should be reversed, and the cause re-

manded with direction to sustain these petitioners' exceptions to the allowance of the bankrupt's claim of exemption, in every part.

Respectfully submitted,

LEOPOLD M. STERN,

Attorney for Petitioners.

Seattle, Wash.

1871

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of BENJAMIN GERBER, Bankrupt, FREEDMAN BROS. COMPANY, SHONINGER, HEINSHEIMER MFG. CO., SHAFF & BARNETT, LEVETT, CROSSMAN & CO., B. LIMON, MORRIS KASHOWITZ, CLASSMAN & NORTH, GAMSON & COHN, REGAL SILK GARMENT CO., BEN J. SCHMIDT & CO., EDWARD ISAAC & CO., BAUER BROS. & CO., J. J. PFISTER KNITTING CO., NEUBAUER BROS., HOLM & NATHAN, J. MIKOLA & BROS., JACOB RAPOPORT, M. HYMAN & CO., H. STERN, HIGH GRADE PETTICOAT CO., FLORENCE SUPPLY CO., and B. WEBSTER,

Petitioners,

vs.

NELSON W. PARKER, Trustee in Bankruptcy for BENJAMIN GERBER,

Respondent.

BRIEF AND MOTION TO DISMISS PETITION FOR REVIEW TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

BLAINE, TUCKER & HYLAND and
TWOROGER & WINKLER,
Attorneys for Respondent.

RAINIER PRINTING COMPANY, SEATTLE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of BENJAMIN GERBER, Bankrupt, FREEDMAN BROS. COMPANY, SHONINGER, HEINSHEIMER MFG. CO., SHAFF & BARNETT, LEVETT, CROSSMAN & CO., B. LIMON, MORRIS KASHOWITZ, CLASSMAN & NORTH, GAMSON & COHN, REGAL SILK GARMENT CO., BEN J. SCHMIDT & CO., EDWARD ISAAC & CO., BAUER BROS. & CO., J. J. PFISTER KNITTING CO., NEUBAUER BROS., HOLM & NATHAN, J. MIKOLA & BROS., JACOB RAPOPORT, M. HYMAN & CO., H. STERN, HIGH GRADE PETTICOAT CO., FLORENCE SUPPLY CO., and B. WEBSTER,

Petitioners,

vs.

NELSON W. PARKER, Trustee in Bankruptcy for BENJAMIN GERBER,

Respondent.

BRIEF AND MOTION TO DISMISS PETITION FOR REVIEW TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

To the Honorable Justices of the Circuit Court of Appeals for the Ninth District:

Comes now Benjamin Gerber, bankrupt, and,

without waiving his right to be heard upon the petition, moves that the petition for review of the order setting aside exemptions in the above entitled cause be dismissed upon the following grounds, to-wit:

I.

That the notice of filing the petition for review, and the petition for review, were served upon the bankrupt on the 24th day of June, 1910, and the notice of fiding the petition for review and the petition for review were filed in this court on the 28th day of June, 1910.

II.

That the said petitioners have failed to file any bond in this case.

BLAINE, TUCKER & HYLAND,....
TWOROGER & WINKLER,
Attorneys for Benjamin Gerber, Bankrupt.

The bankruptcy act does not provide for any bond in proceedings of this character, and we take it that the general act relating to the bond, as provided by rule 13 of the rules of this court, was in effect, and that the petitioners must file some bond to protect the bankrupt on the costs of this appeal.

STATEMENT OF THE CASE.

The questions which the petitioner seek to re-

view relate to the exemptions allowed the bankrupt by the trustee, the order allowing which was apporevd by the referee in bankruptcy, and, on appeal to the Hon. C. H. Hanford, the referee's holding was sustained.

The bankrupt was allowed by the trustee the sum of $150.00 in lieu of certain animals mentioned in the statutes of the State of Washington, and also the sum of $90.00 for provisions for maintenance of himself and family, and, further, a homestead exemption, which the referee found was purchased by the bankrupt while insolvent, and knowing himself to be insolvent, the day before the petition for bankruptcy was filed by him.

BRIEF.

We desire to discuss this matter under two divisions:

1. The order relating to the allowance of cash in lieu of personal property exemptions.

2. The order setting aside the homestead.

I.

The statute under which the personal property exemption was allowed is subdivision 4 of Section 563 of Remington & Ballinger's Annotated Code and Statutes of Washington, which reads as follows:

"To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section."

No claim was made by the petitioners that the bankrupt is not a proper person to whom to allow these exemptions. The only question presented is whether or not he should be allowed the amount of money in lieu of the property described in said section.

At the beginning of our discussion we desire to call the court's attention to the fact that the Supreme Court of the State of Washington has stated many times hat the exemption acts are to be liberally construed to effect the object of the statutes. While there are no cases directly in point in this state upon this subject, we think that the case of *Puget Sound Pressed Beef & Packing Co. vs. Jeffs,* 11 Washington 466, expresses the attitude of the Supreme Court very clearly and upon the principles which should apply to the facts of this case.

The plaintiff in that case sought to have applied upon his judgment the sum of $650.50, which was due the defendant from an insurance company upon an insurance policy covering exempt property which had been destroyed by fire. An extended quotation from this case we believe would very much enlighten your honor upon the attitude of our Supreme Court:

"The question presented by these opposite contentions is an important one. Its determination must depend upon the construciton to be given our statute (Code Proc., Sec. 486, subd. 3) relating to the exemption of personal property from sale on execution. If such statute is to be strictly construed and exemptions thereunder confined to the articles specifically named therein, the contention of the respondent must be sustained for the reason that nowhere in the statute is there any specific provision for the exemption of money paid on account of the loss by fire of exempt property. But if it is to receive such liberal construction as to affect the evident object of the legislature in its enactment, it will well warrant the appellant's contention.

Which of these constructions should this statute receive? Statutes exempting real property from sale on execution have received a liberal construction by nearly all the courts of this country. See *Peverly v. Sayles,* 10 N. H. 356; *Deere v. Chapman,* 25 Ill. 610

(79 Am. Dec. 350); *Connaughton v. Sands*, 32 Wis. 387; *Campbell v. Adair*, 45 Miss. 170; *Kuntz v. Kinney*, 33 Wis. 510; *Ribinson v. Wiley*, 15 N. Y. 489; *Howe v. Adams*, 28 Vt. 541; *Moss v. Warner*, 10 Cal. 296; *Bevan v. Hayden*, 13 Iowa 122; *Montague v. Richardson*, 24 Conn. 337 (63 Am. Dec. 173).

And if statutes exempting real property should be so construed, there is no good reason why those exempting personal property should not receive a liberal construction. The only reason given by those courts, which have adopted a different rule of construction of such statutes when applied to personal property, is that at common law real property was not subject to sale on execution, and was only made subject to sale by statutory provisions, so that statutes exempting it were not in derogation of the common law and did not come within the rule of strict construction applied to statutes of that kind, while those exempting personal property were in derogation of such law for the reason that thereunder such property was subject to such sale. At one time there might have been some reason for a distinction of this kind for the reason suggested, but in modern times in this country such reason has ceased to have much force, and most of the courts now refuse to recognize it. And a very great majority of the courts of this country now liberally construe all exemption

statutes without regard to the property to which they relate. Such courts say that such statutes are remedial and should receive such construction as to give effect to the intention of the legislature. See *Carpenter v. Herrington*, 25 Wend. 370 (37 Am. Dec. 239); *Franklin v. Coffee*, 18 Tex. 413 (70 Am. Dec. 292); *Wassell v. Tunnah*, 25 Ark. 101; *Hawthorne v. Smith*, 3 Nev. 182 (93 Am. Dec. 397; *Gilman v. Williams*, 7 Wis. 329 (76 Am. Dec. 219); *Alvord v. Lent*, 23 Mich. 369; *State v. Romer*, 44 Mo. 99; *Good v. Fogg*, 61 Ill. 449 (14 Am. Rep. 71); *Freeman v. Carpenter*, 10 Vt. 433 (33 Am. Dec. 210).

The courts of some of the states have not adopted this broad rule of liberal construction, but, in our opinion, reason as well as the weight of authority is with those that have. We shall, therefore, apply it in determining the rights of the parties to this appeal, and thereunder it is our duty to look for the object sought to be accomplished by the legislature and give it effect, even although the provisions of the statute are not as full and specific as they should have been.

What was the evident object of the legislature in providing that household furniture should be exempt from execution? There can be but one answer. It was that the family might have something which would enable them to maintain a home and live to-

gether therein. This object can only be subserved by sustaining the contention of the appellant. If the householder is to be protected in the use and enjoyment of his household furniture, he should be protected in taking such steps as will enable him to replace it if lost or destroyed, and common prudence would require that he should make some provision which would enable him to replace it in case it was destroyed by fire, and the usual and economical provision in that regard is to procure a policy of insurance thereon; and when such policy is procured and money paid on account of the desruction of the property, the object of the legislature can only be subserved by holding that such money takes the place of the property insured, and, until a reasonable time has elapsed for its being used in replacing the destroyed property, is exempt from execution the same as the property would have been.

We have not lost sight of the argument made by the respondent to the effect that the insurance money is not the proceeds of the property destroyed, but instead thereof, is money paid upon a contract for an independent consideration, which consideration has no connection with the property. But this course of reasoning has no substantial force when brought in contact with the intention of the legislature, which is made to appear from a liberal construction of the

language used in the statute upon the subject of exemptions. The object of insurance, it is true, is not to protect the insured property. It is, however, to procure means by which such property can be replaced if destroyed, and for the purposes of the application of the exemption law the money paid thereon should be held to bear the same relation to the property destroyed as would other property which might be obtained by way of direct exchange. The fact that the money paid for the insurance was not exempt from execution cannot affect the question. As well might it be claimed that because money not exempt from execution was used in repairing household furniture it would therefore not be exempt.

The exact question here presented has not often come before the courts. From the carefully prepared briefs of counsel, and from such examination as we have been able to give the matter, we are of the opinion that the weight of authority therein is with the contention of the appellant; especially is this true of the more recent cases upon the subject."

This case was decided in *Traders' National Bank vs. Schorr,* 20 Wash. 8, and cited again in the very late case of*State of Washington on the relation of John McKay et al, respondents, vs. A. G. McNeal as Sheriff,* Advance Sheets Vo. 15, Washington Decisions No. 10, page 505, in which the Supreme Court

again reiterates the policy of this state that a court should construe liberally the exemption statutes in favor of the poor debtor.

In the last mentioned case it was claimed that certain property was not exempt under a further subdivision of Section 563, which reads as follows:

"To a farmer, one span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils *actually used about the farm,* not exceeding in value five hundred dollars in coin;"

It was sought to claim one brown gelding, one bay gelding, two gray mares, two colts, two sets of harness, one hack and one wagon as exempt under this statute. The court said:

"There was competent evidence tending to show the following: The respondent John McKee had been engaged in farming as a livelihood for twenty years past, and since 1903 had been living on a homestead in Benton County until the fall of 1908. While living on his homestead he had no stock or farming implements and was unable to buy any. He worked some upon his own land and also worked for his neighbors. He caused some fifteen acres or more of his land to be brought under a state of cultivation and rented his land, taking a share of the crop in payment, but continued to live upon it until the fall of 1908, when he moved with his family into the town of Prosser to enable his children to go to school. In the spring of 1909 he traded his homestead for the property here involved and $368 in money. This money was mostly consumed in the payment of debts, and the balance was consumed in purchasing supplies

for his family and stock. About this time he made arrangements for leasing a ranch in Franklin County, intending to go there and farm upon it. He was still living in Prosser when the property was seized by the sheriff. While there are circumstances tending to contradict some of these facts, we think the evidence was sufficient to warrant the trial court in believing them, as it must have done in rendering the judgment it did. * * *

"Our attention is particularly directed to the words, actually used about the farm.' We do not think that the spirit of our exemption laws contemplate such a strict construction as counsel seeks to apply to this provision. If a man has for years made farming his principal occupation, and intends to do so in the near future, we think the mere fact that he may not be so engaged, and his team, wagon and harness are not being used in farming at the time of the levy, thereby, he is not thereby deprived of his exemption rights under this provision. * * *

"Following the general rule this court has liberally construed our exemptions in favor of the poor debtor. *Mikkleson v. Parker,* 3 Wash. Ter. 527, 19 Pac. 31; *Dennis v. Kass & Co.,* 11 Wash. 353, 39 Pac. 656, 48 Am. Dec. 880; *Puget Sound Pressed Beef & Packing Co. v. Jeffs,* 11 Wash. 466, 39 Pac. 962, 48 Am. St. 885, 27 L. R. A. 808; *Geiger v. Kobilka.* 26 Wash. 171, 66 Pac. 423, 90 Am. St. 733; 18 Cyc. 1380."

The position of the bankrupt in claiming his exemptions has been the practice of the courts in this jurisdiction, under a decision by Judge Hanford in the case of *In re Buelow,* 98 Fed. 89. In his decision Judge Hanford says:

"By his decision the referee allowed to the peti-

tioners as part of their exemption the sum of $250, in lieu of domestic animals not possessed by them, but refused to allow anything for provisions and fuel. The fourth paragraph of Section 5248, Ballinger's Ann. Codes & St., allows to each householder, besides the domestic animals there mentioned, provisions and fuel for the comfortable maintenance of such householder and family for six months; also, feed for the animals for six months; and further provides that if he shall not possess, or shall not desire to retain, the animals above named, he may select and retain other property not to exceed $250.00 in value. I hold that the construction given to this statute by the referee is too narrow. The petitioners are entitled to have provisions and fuel in addition to the $250.00 allowed in lieu of animals, and, as the property has been sold and converted into money, I will order that an allowance be made to them from the funds in the hands of the trustee for $240.00 for provisions and fuel."

In re Lynch, 101 Fed. 579, seems to us to express the true construction to be placed upon these statutes. In that case the bankrupt claimed the property upon which he resided as exempt under the state law allowing a homestead of the value of $1,600, but it was alleged that the property was worth more than that amount, and responsible parties offered to bid larger sums for it. It was held that the property should be offered at public sale by the trustee, after due advertisement, and knocked down to the bankrupt at a bid of $1,600, if no better offer was made, but, if the property brought more than the amount, the bankrupt should receive $1,600

in money out of the proceeds as his exemption. The court held that that was a practical method for the determination in dispute.

"This, it is said, will be in conflict with the theory of the homestead law of the state, which does not, it is insisted, comprehend a sale as one of the methods of ascertaining the value of the property sought to be exempted. It is true, however, that the bankruptcy exemption is not in all respects like the homestead exemption of the state. In value, and seemingly in that alone, it is the same. It need not be invested by the court. It is delivered to the bankrupt himself. It is not liable for his proper indebtedness, even though he should cease to be the head of a family. It seems merely a bonus to him to enable him to start anew in his business ventures. Its value and amount, then, are the only matters with which the court is concerned."

In re Kane, 127 Fed. 552, a question similar to the one raised in this case was presented and a decision was made in accordance with the decision made in this case. In that case the bankrupt was the owner of a stock of groceries, market goods and fixtures at the City of Chicago, upon which was a chattel mortgage to one Clough, who had taken possession thereof under the mortgage and advertised the stock for sale. The receiver in bankruptcy took possession of the stock from the mortgagee under an arrangement, and, after the bankruptcy proceedings, sold the property, paying to the mortgagee the amount of his debt. In the schedule, under the head of "property claimed to be exempted by the state

laws, its valuation, whether real or personal; its description and present use, and reference given to the statute of the state creating the exemption," the bankrupt sets forth as follows: "2 suits of clothing, $25.00; 1 gold watch, $10.00. Further, your petitioner claims as part of the exemption the sum of $365.00. Your petitioner being the head of a family and residing with the same, all of the above property is claimed as exempted under Section 13, Chapter 52, Revised Statutes of Illinois, approved May 24, 1877. In force July 1, 1877." On December 4, 1902, the bankrupt petitioned the court that the trustee file a report setting apart the bankrupt's exemptions, to which the trustee replied that he was unable to set apart any exemption, because the bankrupt had failed to claim any specific property as exempt, and that the only property coming to the possession of the trustee was cash derived from the sale of assets by the receiver, and claimed that the bankrupt had waived any right to exemptions. Upon a petition for review of this order the District Court overruled the referee, and the trustee was directed to pay the bankrupt $365.00 in cash, as his exemptions, less his proportionate share of the shrinkage of the estate and expenses in making sale of the property. A portion of the opinion follows; Jenkins, Circuit Judge, after stating the facts as above:

"A court of bankruptcy is a court of equity, seeking to administer the law according to its spirit and not merely by its letter. The bankruptcy act provides that it shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws at the time of the filing of the petition. * * * It also provides by Section 7 that the bankrupt in the schedules to his petition shall make a claim for such exemtpoisn as he may be entitled to. The statute of Illinois (Starr & C. Ann. St. 1896, 2. 52, par 15, p. 1892), after exempting certain specific property, exempts $100 worth of other property, to be selected by the debtor, and, in addition, when the debtor is the head of a family, and resides with the same, $300 worth of other property to be selected by the debtor. It is insisted that the bankrupt is not entitled to his exemptions because he had not claimed specific articles of property. The bankruptcy act allows the exemptions which the state law provided, and these laws, from motives of public policy, should be liberally construed. Courts of bankruptcy are not controlled as to the time or the manner in which claims for exemptions may be preferred in bankruptcy. The exemptions provided by the law of the state are allowed by the bankruptcy act, but the manner of claiming such exemptions, and of setting apart and awarding them, is regulated by the bankruptcy act. We have so held *In re Friedrich*, 40 C. C. A. 378, 100 Fed. 284. It was also ruled by this court *In re Mayer*, 47 C. C. A. 512, 108 Fed. 599, 600, that the bankrupt under the act could waive the exemptions in favor of the assignee claiming the proceeds of the sale of the property or not, as he should choose. The purpose of the state statute of exemptions was to allow the debtor property to a certain amount for the support of his family, that they should not be cast destitute upon the world. It is true that statute provided that the debtor should select the articles. The bankruptcy law allowed that exemption recognizing the public benefit of such exemption. But the manner of its allowance is reserved to the bankruptcy court, and

its action is not controlled by the specific manner of allowance prescribed by the state law, for the trustee is to set off to the bankrupt the exemptions claimed, with the estimated value of each article, and cases are not infrequent where it appeared for the benefit of all concerned that the stock should be sold as an entirety, that it was so sold by arrangement between the creditors and debtor, and courts have upheld the claims of the debtor to the value of his exemptions from the proceeds of the sale. And that is just."

Many cases have been decided by the Circuit Court of Appeals in cases where it was difficult to select the articles, or where, owing to their nature, or subject to the condition of the bankrupt estate, it was impracticable to select the specific articles, and in all of such cases this court has permitted all the bankrupt estate to be sold and the exemptions paid to the bankrupt in cash. Some of the more recent cases are as follows:

Dunlap Hardware Co. v. Huddleson, 167 Fed. 433;

In re Luby, 155 Fed. 659;

In re Richard, 94 Fed. 633;

In re Arnold, 169 Fed. 1000.

In the last case, where the stock was sold for 66 per cent. of the inventoried value, the bankrupt was allowed that proportion of his exemptions in cash. In the case now before this court the stock was sold for 60 per cent. of its inventoried value, and the

referee allowed 60 per cent. of the $250 to be set apart in lieu of the animals mentioned in the statute of Washington above set forth, and 60 per cent. of the referee's allowance of $25.00 per month in lieu of the provisions for the support of bankrupt and his family. In his decision Judge Hanford says, at page 25 of the transcript of the record:

"After laboriously studying the record, my conclusions are that the order made by the referee is equitable and the aggregate of the allowances approximate what in my opinion is the legal right of the bankrupt.

"I doubt whether the law authorizes the court to scale down the case allowed in lieu of domestic animals in proportion to the difference between the appraised value and the amount realized from a sale of the bankrupt's property, and I do not wish this decision to be considered as a precedent for such determination of a bankrupt's rights. An allowance of money in lieu of provisions and fuel was made by the court in the *Buelow Case,* 98 Fed. 86, and I have not, since that decision was rendered, entertained any doubt as to its propriety in that case. This case is distinguishable by the fact that objections were made in behalf of the creditors to the allowances of cash instead of the specific kind of property which might have been selected, and there appears to be no denial of the assertion made that the bankrupt might have made his selection of property before it was sold, and neglected to do so. This objection, if sustained, would require the court to cut out the $90.00 allowed by the order of the referee in lieu of provisions and fuel. If this were done, however, I would change the order so as to allow as much as the statute allows in lieu of domestic animals which the bankrupt did not possess, an in such a modifica-

tion of the order there would be a gain to the bankrupt of $10.00."

Many other cases may be called to the court's attention which hold that money is exempt as personal property.

Williamson v. Harris (Ala.), 29 Am. Rep. 707, as to a claim of exemption in money instead of other property, says:

"It is his right to select that which he will retain, and the selection operates in relief of other property from like claim, when the value of all that he claims and retains shall have reached one thousand dollars. It is personal property in its broadest and largest sence, the constitution exempts, and its exemption is from liability for the payment of debts —not from liability when particular process is sued out to subject it."

Burdge v. Bolin, 55 Am. Rep. 724 (Ind.), The question which the court decided in this case was whether the sum of $540.00 was by law exempt from execution.

"Upon the facts found by the court in the case under consideration, admitted by appellant to have been fully and correctly found, we are strongly impressed with the opinion that the trial court arrived at a just, wise and equitable conclusion of the law. The fundamental law of this state, in Section 22 of the Bill of Rights, has enjoined upon the general assembly to recognize the privilege of the debtor to enjoy the necessary comforts of life, by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of debt or lia-

bility thereafter contracted. Responsive to this constitutional injunction the general assembly has provided in Section 703, Revised Statutes 1881, that an amount of property not exceeding in value $600, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied. This court has uniformly held that our statutes of exemption of a debtor's property from seizure or sale for the payment of any contract, lebt or liability, must be liberally construed." (Citing many cases.) * * *

"Where the right to an exemption of property from seizure and sale on execution clearly exists under the law, we have often held, and correctly so, we think, that merely formal or technical objections will not be allowed to prevent the debtor from claiming the benefit of his exemption. *Douch v. Rahner,* 61 Ind. 64; *Haas v. Shaw, supra; Butner v. Bowser, supra.*"

The court there held that the sum of money was exempt, not exceeding in value $600, under the statute.

Chilcote v. Conley, 36 O. St. Rep. 545. The homestead act of Ohio provides as follows: "That it shall be lawful for any resident of Ohio, being the head of a family and not the owner of a homestead, to hold exempt from execution or sale as aforesaid, personal property, to be selected by such person, not exceeding three hundred dollars in value, in addition to the amount of chattel property not by law exempted." The sum of $200 in money was in the

hands of a third person, belonging to the person who now seeks to claim the said sum as exempt from a writ of attachment. The court said:

"Upon the facts now stated in the record, we think McRill was entitled to select the 'money' in the hands of Chilcote as 'personal property' and hold the same exempt from seizure by attachment. This results from the reasonable and proper construction of the statutory provisions upon the subject."

Fenning v. First National Bank of Jacksonville, 76 Ill. 57. In this case the court held a sum of money in the bank as exempt where the statute provided "$100 worth of other property suited to his or her condition of life, selected by the debtor."

Other cases are:

Brewer v. Granger, 45 Ala. 580;
Gray v. Putnam, 51 S. C. 97.

There is no showing in this record but what the sum of money which was allowed to the bankrupt as exempt was in the hands of the trustee, or turned over to the trustee by the bankrupt upon his filing his petition. It must therefore be presumed that these funds were in the hands of the trustee of the bankrupt estate, and under the case above cited the bankrupt would be entitled to claim the money exempt as personal property. On either theory of this case, there is no showing that the bankrupt is not getting that to which he is legally intitled, and, in fact, he is only getting 60 per cent. of that to which he is legally en-

titled. It therefore seems to the bankrupt's attorneys that the finding and order of the referee and the Honorable District Judge should be sustained by this court.

II.

In relation to the homestead exemption, the statutes of Washington provide as follows:

Sec. 528. "The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided."

Sec. 552. "Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of two thousand dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes."

Sec. 559. "The declaration of homestead must contain: 1. A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit; 2. A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claim them as a homestead; 3. A description of the premises; 4. An estimate of their actual cash value."

Sec. 560. "The declaration must be recorded in the office of the auditor of the county in which the land is situated."

No contention is made by the petitioning creditors that the estate set aside to the bankrupt as a homestead exceeds in value the statutory amount, or that the bankrupt is not a person entitled to claim a homestead, or that the declaration of homestead was not properly made and filed. The sole contention presented by them is that, because of the fact that this homestead was purchased by the bankrupt when he was insolvent, and knew that he was insolvent, that it was made for the purpose of withholding said funds from his creditors and thereby work fraud upon them, which in law would forfeit his homestead exemption.

Like the personal property exemption, the Supreme Court has said that the homestead exemption should be liberally construed to effect its object, and it has been liberally construed by the Supreme Court of the State of Washington in cases that have come before it.

It has been held by the Supreme Court, in the case of *Lewis vs. Mauer,* 35 Wash. 156, where a homestead has been duly selected according to the declaration of homestead provided by the code in Section 559, hereinbefore quoted, that the actual occupation of same is not necessary to maintain the right to homestead exemption.

It has been further held in the case of *Becher vs.*

Shaw, 44 Wash. 166, that under the section of the code authorizing the voluntary sale of an exempt homestead free from all claims or liens, and under a liberal construction of the exemption laws, the proceeds of such sale which the owner intends in good faith to reinvest in another homestead are exempt from garnishment. The court said:

"We think that a liberal construction of the statute requires us to so hold, and that any other construction would in a measure defeat the beneficent purpose the legislature had in view. Of what avail would it be to the homestead claimant to sell his homestead free from any claims and liens if the proceeds are to become immediately subject to execution or garnishment. If the claimant may exchange one homestead for another without forfeiting his exemption rights, why should he not be permitted to accomplish the same result through the medium of a sale?"

Other cases in this state, showing the liberality of the exemption law, which we do not desire to take up your time by quoting at length, but which may be investigated by this court if it so desires, are as follows:

McQuillan v. Mau, 1 Wash. 26;

Wiss v. Stewart, 16 Wash. 376;

Anderson v. Stadlmann, 17 Wash. 433;

Ross v. Howard, 25 Wash. 1;

In the matter of the Estate of Hattie Heas, 30 Wash. 51;

In re Murphy Estate, 46 Wash. 574;

Morse v. Norris, Advance Sheets, Vol. 14, Washington Decisions, No. 9, p. 511.

And this point has been decided by the Circuit and Federal courts many different times. We do not feel called upon to discuss it at any length, but merely to call your honor's attention briefly to the facts and reasons.

In the case of *In re Tildon,* 91 Fed. 500, the court held that to effectuate the object of the homestead exemption the trustee of the bankrupt estate should pay the taxes out of he bankrupt estate which were legally assessed and due on the homestead of the bankrupt and constituting a lien thereon at the time of the adjudication, although such homestead has been set apart to the bankrupt as exempt under the act. Woolson, District Judge, says:

"Again, exemption laws are to be liberally construed to accomplish the purpose of the exemption. The homestead is exempt that the family may have its sheltering roof and protection in the vicissitudes of financial distress. Why may not the same general propositions apply to the bankrupt statute? And, if liberality of construction became necessary in order to give to the homestead and those for whom the exemption was originally made the benefit of the statute under consideration, why is not such liberal construction proper, if only such construction can carry out the beneficent purposes of the exemption, and if the contrary construction would tend to defeat it? Since the bankruptcy statute has adopted

the statutory exemptions, granted by the state, is violence committed to the spirit which caused such adoption if the bankruptcy statute itself is construed in that matter with the liberal construction which obtains in all the states as to such exemption statutes? And, in this view, we may ask for the reasons which, while compelling the homestead to be set off to the bankrupt as exempt property to himself and family, yet would permit it to be sold away from them at a tax sale, although the estate of the bankrupt has funds wherewith the taxes might be paid, and the exemption of the statute fully and effectively maintained."

In re Irwin, 120 Fed. 733, a case decided by the Circuit Court of Appeals for the Eighth District, the facts of the case were somewhat similar to the facts in the case at bar.

"The bankrupt claims as exempt as his homestead lots 6, 7, 8, 9 and 10 in block 14, in the town of Casa, Ark. The lots are in the business part of the town, and there is on them a wooden building 44 feet wide and 100 feet long, and in the southeast corner of the building a room 20x50 feet, both buildings under one roof, and divided by a frame partition. Entrance to this room was from the store and also from the street. The entire building was erected by the bankrupt in 1901, and the large room was used by him exclusively as a storehouse, and the smaller room rented out by him, and was used at one time as a billiard hall, and, up to the time he moved in, as a restaurant. On December 14th, six days before his failure, and in contemplation of bankruptcy, he moved his family, which up to that time had resided in a rented dwelling house in another part of the town, into the smaller room, making it the home of his family, which consisted of himself, wife and six children. Until he moved into this room there

was no effort to impress this property with the homestead character, though when built the bankrupt stated that he intended the buildings for a store and a home to live in. At the time the debts due from the bankrupt were contracted, no part of the premises was used as his homestead, and, from the character and arrangements of the building until he moved into it, the referee finds the buildings were primarily intended for business purposes, to the exclusion of a home for the family, and that the bankrupt had no other homestead."

"The Constitution of the State of Arkansas contains the following provisions on the subject of homesteads:

" 'The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity.'

" 'The homestead in any city, town or village, owned and occupied as a residence, shall consist of not exceeding one acre of land, with the improvements thereon, to be selected by the owner, provided the same shall not exceed in value the sum of two thousand five hundred dollars, and in no event shall such homestead be reduced to less than one-quarter of an acre of land without regard to value.' Art. 9, 3. 5.

"Under these provisions of the constitution it is well settled that an insolvent debtor may acquire a homestead that will be free from the claims of his

creditors, both prior and subsequent. It has been distinctly held that the acquisition of a homestead by an insolvent debtor is not fraud upon his creditors. *Backer v. Meyer* (C. C.), 43 Fed. 702; *First National Bank v. Glass*, 25 C. C. A. 151, 79 Fed. 706; *Huenergardt v. Brittain Dry Goods Co.* (C. C. A.), 116 Fed. 31. And it is not material when the debtor occupies the premises as a homestead, provided they are so occupied before creditors acquire a lien thereon by attachment or other judicial proceedings. This rule is applicable to a trustee in bankruptcy, and, as the bankrupt was occupying the premises as a homestead some time before he was adjudged a bankrupt, they constitute no part of his estate in bankruptcy, and the trustee has no right to the same. In a town or village the constitution gives a debtor the right to have and hold a homestead 'not exceeding one acre of land with the improvements thereon.' The debtor is not required to occupy and use as a dwelling all 'the improvements' on the lot, for that would make it obligatory on him to occupy his barn and other outhouses for living purposes; and no more is he required to occupy every room in his dwelling for domestic purposes. He may devote a part of his dwelling to business purposes. Our ancestors very generally carried on their business pursuits in their dwelling houses. And the Supreme Court of Arkansas holds that a storehouse entirely separate from the residence on the homestead, and not used as an appurtenance and convenience thereto, is a part of the homestead so long as the homestead does not exceed the constitutional limit of area and value. *Klenk v. Knoble*, 37 Ark. 298; *Gainus v. Cannon*, 42 Ark. 503; *Berry v. Meir* (Ark), 66 S. W. Rep. 439. In *Gainus v. Cannon, supra*, the court said: 'It is a strange and irrational idea, sometimes advanced, that a man ought to lose his homestead as soon as he attempts to make any part of it helpful in family expenses.' There are decisions in other states to the same effect, but, as we are only concerned in knowing and applying the law of Arkansas to the case in hand, it is not

necessary to cite them. The premises in question having been impressed with the character of a homestead before the debtotr was adjudged a bankrupt, his trustee in bankruptcy cannot rightfully claim the same as part of the bankrupt's estate."

In re Thompson, 140 Fed. 257, District Court of Washington, Eastern Division, the facts appear that the debtor had lived with his family upon a farm owned by him for several years, when his house was burned and he moved into one owned by another, but continued to use his farm and keep his stock there. Subsequently he moved into town for the purpose of sending his children to school, but without intention of remaining, except temporarily, and during such time he and his wife returned and built an addition to a small house, and executed and filed a declaration of homestead on the farm under the Washington statute, which gives the right to a homestead only in the dwelling house in which the claimant resides and the land on which it is situated. This declaration was filed in contemplation of bankruptcy, and the debtor shortly afterwards filed a petition in bankruptcy, on which he was adjudged a bankrupt. It further appeared that the bankrupt with his family moved to Lewiston in the State of Idaho, taking with them a large portion of their household goods, but leaving a part of them on and near the land claimed as a homestead. Up to the time of the burning of the house on this land, there was nothing to

indicate anything other than a *bona fide* residence by the bankrupt and his family and the claiming of the same as a home. After the souse was burned it seems that the bankdupt continued to keep his stock on the place and to maintain his improvements and receive his mail at the same box where he had theretofore received it. The real controversy begins with the removal to Lewiston. The court said:

"The testimony also establishes that he and his wife were occupying the land and the house thereon at the time of filing of the homestead declaration on November 28, 1904. They kept a hired man there. Their stock was taken care of on the place. Their occupancy was as good as they could make it, considering that they were maintaing a house at Lewiston for the purpose of sending their children to school. In this connection the finding must be that Thompson and wife came back to the land at that particular time for the express purpose of filing their homestead declaration and claiming the land as a homestead, that they built the addition to the small house already there for that purpose, that they had the bankruptcy proceeding in view, that it was for the purpose of claiming this property as exempt that they improved and added to the house at that time, and that they occupied it in full contemplation of the petition in bankruptcy, which they at the time expected to file. If there can be fraud in connection with the claiming of a homestead, considering the conveyance in connection with these facts, it is here presented." * * *

"An insolvent debtor may purchase a homestead with moneys realized by the sale and disposal of non-exempt assets, and fraud cannot be imputed to such act. *Kelley v. Sparks et ux.* (C. C.), 54 Fed. 70.

The use of property not exempt from execution by a debtor to procure the title to a homestead in his own name is not a fraud upon his creditors. That which the law expressly sanctions and permits cannot be a legal fraud. *First National Bank of Humboldt, Neb., v. Glass et al.,* 79 Fed. 706, 25 C. C. A. 151." * * *

"So *In re Stone* (D. C.), 116 Fed. 35, the bankrupt removed with his family into a building owned by him after he became insolvent, and in contemplation of bankruptcy; but the right to the homestead was sustained nevertheless."

In re Letson, 157 Fed. 78, Hook, Circuit Judge, said:

"In the absence of a local rule to the contrary, and there is none in Oklahoma, the mere use by an insolvent of non-exempt funds or assets in acquiring a homestead does not make it subject to the claims of creditors. Assuming the rule to be otherwise when there is an intent to cheat and defraud creditors, it should be said that the existence of such intent was disputed in the case before us. The referee found it existed; the District Court, upon the same evidence, found it did not exist, for such is the effect of its general finding in favor of the bankrupt." * * *

"That the rule is that during the four months preceding the filing of a petition in bankruptcy the bankrupt holds his non-exempt property in trust for his creditors, and in case of breach of the trust the creditors or their representatives—the trustee in bankruptcy—possesses the usual remedies of *cestui que trust,* including the right to follow all such property wherever it can be discovered and identified in original or altered form. This is altogether a misconception. The bankrupt and his creditors sustain no such relation before the filing of the petition.

Upon the appointment and qualification of the trustee, his title relates back to the time of the adjudication, and his rights and remedies as to property previously disposed of are definitely defined and limited by the bankruptcy act."

In re Stone, 116 Fed. 35. In this case Trieber, District Judge, uses the following language:

"Does the fact that the bankrupt made the premises his homestead when he knew that he was insolvent, and in contemplation of bankruptcy, constitute such a fraud as to deprive him and his family of the benefit of the exemption laws? In determining this question it must be remembered that the object of the homestead exemption, under the laws of this state, as declared by the Supreme Court, is 'to secure to every head of a family a home and place of residence, which he may improve and make comfortable, and where the family may be sheltered, and live beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot avoid.' 25 Ark. 103. A fraudulent conveyance of the homestead does not cause the debtor to forfeit it. *Bennett v. Hutson*, 33 Ark. 762; *Turner v. Vaughan*, Id. 454; *Carmack v. Lovett*, 44 Ark. 180; *Bogan v. Cleveland*, 52 Ark. 101, 12 S. W. 159, 20 Am. St. Rep. 158; *Blythe v. Jett*, 52 Ark. 548, 13 S. W. 137; *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241. If a debtor while insolvent may take property not exempt, and invest it in a homestead, and hold that as exempt, is he not clearly entitled to appropriate property owned by him for his homestead, by moving his family into it, and using it, when insolvent, as a family dwelling? That the former may be done is settled by numerous decisions. *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049; *Cipperly v. Rhodes*, 53 Ill. 347; *Jacoby v. Distilling Co.*, 41 Minn. 227, 43 N. W. 52; *Sproul. v. Bank*, 22 Kan. 336; *O'Donnell v. Segar*, 25 Mich. 367; *Kelly v.*

Sparks (C. C.), 54 Fed. 70. This rule has been recognized in this court by Judge Caldwell in *Backer v. Meyer* (C. C.), 43 Fed. 702, and by the Circuit Court of Appeals for the Eighth District in *Bank v. Glass*, 25 C. C. A. 151, 79 Fed. 706. In the last case, Judge Sanborn, in delivering the opinion of the court, says:

" 'If he takes property not exempt from judicial sale, and applies it to this purpose, he merely avails himself of a plain provision of the constitution or the family. He takes nothing from his creditors by this action in which they have any vested right. * * * Nor can the use of property that is not exempt from execution to procure a homestead be held to be a fraud upon the creditors of an insolvent debtor, because that which the law expressly sanctions and permits cannot be a legal law.' "

And Judge Caldwell, in *Backer v. Meyer, supra*, said:

" 'The homestead of the defendants was purchased by Meyer, after his insolvency, in the name of his wife, but this fact does not make it any the less the family homestead. If Meyer had purchased the homestead in his own name, it would, under the constitution and laws of the State of Arkansas, have been exempt, and the creditors were not, therefore, defrauded or prejudiced by the fact that it was purchased in the name of the wife.'

"*In re Wright*, 3 Biss. 359, Fed. Cas. No. 18,067, and *In re Lammer*, 7 Biss. 269, Fed. Cas. No. 8031, different conclusions were reached by the court, but this court is concluded by the decisions of the highest court of this state and not those of the United States Circuit Court of Appeals for the Eighth Circuit."

The cases in the foregoing opinion have settled the rule that a debtor, while insolvent, may take prop-

erty not exempt and invest it in a homestead and hold it as exempt. That such an act is not committing fraud upon his creditors, for he is merely doing what the law entitles him to do.

We respectfully submit that the judgment of the District Court should be sustained.

BLAINE, TUCKER & HYLAND,
TWOROGER & WINKLER,
Attorneys for Bankrupt.